93-7200

No. 93 - ___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

.....

HENRY LEE MCCOLLUM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

.....

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

.....

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76 pp

QUESTIONS PRESENTED

I. WHETHER PETITIONER'S JURY UNCONSTITUTIONALLY DETERMINED THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" BASED UPON INSTRUCTIONS (A) THAT FAILED TO LIMIT ITS CONSIDERATION TO PETITIONER'S PERSONAL RESPONSIBILITY REQUIRED BY TISON V. ARIZONA AND ENMUND V. FLORIDA AND (B) THAT WERE EQUALLY AS NEBULOUS AS THE LANGUAGE OF THE AGGRAVATING FACTOR ITSELF THAT FAILED ADEQUATELY TO NARROW THE DEATH ELIGIBLE CLASS IN VIOLATION OF GODFREY V. GEORGIA AND MAYNARD V. CARTWRIGHT?

II. WHETHER PRECLUDING PETITIONER FROM INQUIRING IF PROSPECTIVE JURORS WOULD AUTOMATICALLY VOTE TO RETURN A SENTENCE OF DEATH BECAUSE OF THEIR ATTITUDES ABOUT PAROLE ELIGIBILITY VIOLATED HIS EIGHTH AND FOURTEENTH AMENDMENTS?

III. WHETHER THE FAILURE TO SEAT PROSPECTIVE AFRICAN-AMERICAN JURORS AS A REMEDY FOR AND CURE OF THE FREQUENT USE OF RACIALLY MOTIVATED PEREMPTORY CHALLENGES BY THE PROSECUTOR DENIED PETITIONER AND THE EXCLUDED VENIREMEMBERS THEIR RIGHTS TO EQUAL PROTECTION?

IV. WHETHER DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL PROHIBIT THE USE OF AGGRAVATING FACTORS BASED ON CONDUCT FOR WHICH THE JURY HAS ACQUITTED PETITIONER IN THE GUILT PHASE OF THE PROCEEDINGS WHEN THE PROSECUTION IS REQUIRED TO PROVE THE SAME FACTS BEYOND A REASONABLE DOUBT TO OBTAIN THE DEATH SENTENCE?

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Petitioner, Henry Lee McCollum, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered on 30 July 1993.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is officially reported at 334 N.C. 208, 433 S.E.2d 144 (1993), and is reproduced in the Appendix. [App. 1-26]

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming petitioner's

conviction and sentence was entered on 19 August 1993. [App. 109][1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const., amend. V: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb, ...

U.S. Const., amend. VI: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ...

U.S. Const., amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

N.C. Gen. Stat. §15A-2000(b):[2] . . . After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following factors: (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exists; (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist, and (3) based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

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[1] The opinion of the Supreme Court of North Carolina was filed on 30 July 1993. The actual judgment of the Supreme Court of North Carolina is entered on the docket by the clerk twenty (20) days after the date of the filing of the opinion. N.C. R. App. P. 32(b).

[2] N.C. Gen. Stat. §15A-2000 is reproduced in the Appendix. [App. 27-28]

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors . . . .

N.C. Gen. Stat. §15A-2000(e): Aggravating Circumstances. Aggravating circumstances which may be considered shall be limited to the following:

. . .

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

. . .

(9) The capital felony was especially heinous, atrocious, or cruel.

STATEMENT OF THE CASE

This case presents four fundamental issues of federal constitutional import, each of which petitioner presented to the Supreme Court of North Carolina and the trial court. First, the sentencing jury relied on the impermissibly vague "especially heinous, atrocious, or cruel" aggravating circumstance without being given instructions that either (a) required the jury to find petitioner personally committed the heinous acts or intended the especial heinousness or (b) defined these pejorative terms in a constitutionally permissible fashion. Second, the trial court unfairly limited petitioner's ability to select an impartial jury by preventing voir dire about veniremembers' misconceptions regarding and attitudes toward petitioner's eligibility for parole if given a life sentence for first degree murder. Third, both courts denied this African-American petitioner and several African-American veniremembers a meaningful remedy for the prosecutor's inexcusable racial discrimination in jury

selection when the trial court began jury selection with a new venire rather than seating the affected individuals after finding multiple violations of *Batson v. Kentucky*. Finally, the sentencing jury's reliance on an aggravating factor premised on an offense for which the jury acquitted petitioner in the guilt phase violated his constitutional protections of double jeopardy and collateral estoppel. These serious violations marred the death sentence imposed on this mentally retarded individual who was only nineteen at the time of the murder and very susceptible to the influences of others.

A. Procedural Developments.

Petitioner was first tried and convicted of first degree murder and first degree rape in 1984, along with his brother, Leon Brown. Both were sentenced to life imprisonment for first degree rape and to death for first degree murder. The Supreme Court of North Carolina ordered a new trial. *See State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988).

After a change of venue, the matter came on for a second trial in 1991. Petitioner was tried alone. The jury convicted him of first degree rape and first degree murder under a felony murder theory. The jury recommended a sentence of death and the trial court imposed that judgment. The Supreme Court of North Carolina affirmed the convictions and sentence. *State v. McCollum*, 334 N.C. 209, 433 S.E.2d 144 (1993).

B. Factual Background.

Police took petitioner into custody on 28 October 1983 and interrogated him for several hours. During this lengthy questioning, police eventually obtained a statement that became the primary evidence against petitioner in a trial for rape and murder.

In 1983, petitioner was a retarded nineteen year old African-American who suffered from emotional disabilities and had an I.Q. of 56. After considering his difficulties in reading, in understanding English spoken at an adult level, in paying attention, in anticipating consequences, in controlling his impulses, and in thinking under stress, an expert psychologist found petitioner had the mental age of an eight- or nine-year-old child. At a hearing on a motion to suppress his statement, this expert explained that at the time the police took the statement, petitioner was not capable of understanding his constitutional rights or of understanding the statement. In spite of plenary evidence of petitioner's incapacity, the trial court refused to suppress the statement.

According to this statement, on the evening of 24 September 1983, petitioner was with a group that included Darrell Suber, Chris Brown, Leon Brown, and Sabrina Buie. The males in the group proposed that Sabrina Buie have sex with them, but she refused. Darrell Suber talked Sabrina Buie into going with the group into the woods. Once in the woods, Suber announced he was going to have sex with Buie. Suber and Chris Brown removed her clothes, while Leon Brown and petitioner held her arms. Then Suber raped her, and Chris Brown raped her. Later, Leon Brown and petitioner raped her. Leon Brown also sodomized her.

According to the statement, following the rapes, Suber said, "We got to do something because she'll go up town and tell the cops we raped her. . . . [W]e got to kill her to keep her from telling the cops on us." Chris Brown then attached the victim's panties to a stick and forced the stick down her throat. At the same time, Suber cut the victim with a knife. Leon Brown and petitioner held her arms. The victim died of suffocation.

The state never indicted Darrell Suber for these crimes. The state never

indicted Chris Brown for these crimes. Leon Brown, petitioner's brother, was tried and convicted of rape, but not convicted of murder. The state only tried and convicted petitioner for the murder of Sabrina Buie. Only petitioner -- not Darrell Suber, Chris Brown, or Leon Brown -- faces punishment for her murder, and he has been sentenced to die.

The trial court submitted the murder charge to the jury on two separate and independent grounds: a murder with a specific intent to kill formed after premeditation and deliberation and a murder in the course of a felony. [App. 72] The prosecutor specifically urged the jury to find petitioner guilty of both crimes. Nevertheless, petitioner's jury declined to find him guilty of murder with malice, premeditation and deliberation. Instead, it found him guilty only of felony murder.

At the sentencing phase of the trial, petitioner presented extensive mitigating evidence, including expert psychiatric testimony. In addition, the jury considered live and videotaped testimony of family members and former teachers.

The mitigating evidence concerned a number of circumstances, including petitioner's lack of mental and intellectual capacity, his mental and emotional difficulties, his upbringing in an impoverished urban environment, and his participation in religious activities while in prison. This evidence was largely uncontroverted.

Despite the jury's prior refusal to find petitioner guilty of murder with premeditation and deliberation, the trial court submitted two aggravating circumstances to the jury: that the murder was committed for the purpose of avoiding or preventing a lawful arrest and was especially heinous, atrocious, or cruel. Both of these factors rested on a partial determination that petitioner killed Buie with a specific intent formed after premeditation and deliberation. The trial court also submitted sixteen

mitigating circumstances. The jury found the two aggravating circumstances and seven mitigating circumstances. It failed to find several mitigating circumstances that were clearly established, including one statutory circumstance -- lack of mental capacity -- on which the trial court gave a peremptory instruction. The jury recommended a death sentence despite the significant evidence of petitioner's retardation and his substantially lesser culpability than Darrell Suber and Chris Brown, neither of whom have even been indicted for this incident, and Leon Brown, who was acquitted of murder in a separate trial.

Although the lower court affirmed, two justices dissented. Chief Justice Exum authored this dissenting opinion. He based his dissent on the disproportionality of the death sentence imposed on petitioner. *State v. McCollum*, 334 N.C. at 247-51, 433 S.E.2d at 166-68 (Exum, C.J., dissenting). The disproportionality stemmed from several salient principles: (1) juries almost always return life sentences in felony murder cases where the perpetrator is under twenty-one (petitioner was nineteen at the time of the crime); (2) juries almost always return life sentences in rape-murder cases where, as here, the evidence showed and the jury found the perpetrator to be mentally and emotionally disturbed; and (3) juries always return life sentences where the perpetrator is found, as here, to be mentally retarded (petitioner had I.Q. of 56). *Id.* at 248-50, 433 S.E.2d at 166-68.

Chief Justice Exum also suggested the manifest unfairness of Darrell Suber and Chris Brown escaping liability for these crimes. Likewise, he noted a different jury acquitted Leon Brown of this murder. When these aspects of the situation are juxtaposed with the jury's implicit acquittal of petitioner for an intentional, premeditated murder [App. 72] and the jury's finding that he did not kill or intend to kill Sabrina Buie [App. 30], the punishment is most assuredly excessive.

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

The four questions raised in this petition were presented to the Supreme Court of North Carolina and to the trial court based upon a violation of petitioner's federal constitutional rights to be free from double jeopardy, to a fair and impartial jury, to be free from cruel and unusual punishment, and to due process of law. U.S. Const., amend. V, VI, VIII, XIV. Each federal constitutional claim was addressed and resolved on the merits. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993).

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S JURY UNCONSTITUTIONALLY DETERMINED THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" BASED UPON INSTRUCTIONS (A) THAT FAILED TO LIMIT IT TO HIS PERSONAL RESPONSIBILITY REQUIRED BY TISON V. ARIZONA AND ENMUND V. FLORIDA AND (B) THAT WERE EQUALLY AS NEBULOUS AS THE LANGUAGE OF THE AGGRAVATING FACTOR ITSELF THAT FAILED ADEQUATELY TO LIMIT IT IN VIOLATION OF GODFREY V. GEORGIA AND MAYNARD V. CARTWRIGHT.

Petitioner's sentencing jury condemned him to die based in large measure on its finding that the capital felony was "especially heinous, atrocious, or cruel." [App. 29] *see* N.C. Gen. Stat. §15A-2000(e)(9). "[T]here is no serious argument that . . . [those words are] not facially vague." *Walton v. Arizona*, 497 U.S. 639, 654 (1990); *accord Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980). Where, as here, "petitioner was not the actual killer," a finding that the murder is especially heinous, atrocious, or cruel is "more questionable." *Lankford v. Idaho*, 500 U.S. ____,

114 L.Ed.2d 173, 186 (1991). The trial court's instructions, like those in *Cartwright* and *Godfrey*, were equally vague in explaining these terms. [App. 43-44] *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993). These instructions merely defined an especially heinous, atrocious, or cruel murder as one where "any brutality which was involved in it must have exceeded that which is normally involved in any killing." [App. 43] They did not limit this factor to petitioner's conduct or *mens rea*. The instructions challenged here are the standard, pattern instructions used in North Carolina in every capital trial. The lower court summarily rejected petitioner's constitutional challenge to this factor. [App. 8] 334 N.C. at 222, 433 S.E.2d at 151. Interpreting petitioner's moral culpability based upon the acts of others failed to accord him the individualized sentencing required by the Eighth Amendment. This construction of heinous, atrocious, or cruel is also wholly at odds with a long and consistent line of this Court's decisions. Because this factor is used in numerous capital trials in North Carolina, the issue is of fundamental importance to the constitutionality of North Carolina's capital jurisprudence. A writ should issue and the judgment summarily reversed. In the alternative, a writ of certiorari should issue to allow plenary review of this question regarding an unconstitutionally vague construction of the pejorative terms. *See Arave v. Creech*, 507 U.S. ___, 123 L.Ed.2d 188 (1993).

A. The Eighth Amendment Requires Limiting Instructions More Specific Than Those Used In Petitioner's Case.

Under the Eighth Amendment "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *accord Lewis v.*

Jeffers, 497 U.S. 764, 775 (1990). It is a fundamental constitutional requirement that a capital sentencing scheme channel and limit the sentencer's discretion in imposing the death penalty. This doctrine serves two important purposes. First, it minimizes "the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). It makes "'rationally reviewable the process for imposing a sentence of death.'" *Jeffers*, 497 U.S. at 774; *Godfrey*, 446 U.S. at 428.

A state may rely on the presence of certain aggravating factors to accomplish this "constitutionally necessary narrowing function." *Pulley v. Harris*, 465 U.S. 37, 50 (1984). To achieve this purpose, however, such factors must "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Given the "constitutionally necessary narrowing function" of aggravating factors, and in order to ensure that they fulfill the "fundamental constitutional requirement [of] sufficiently minimizing the risk of wholly arbitrary and capricious action," an aggravating factor must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Jeffers*, 487 U.S. at 774; *Godfrey*, 446 U.S. at 428; *see Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).

When a jury is the capital sentencer, as in North Carolina,[3] a facially vague aggravating circumstance must be corrected by proper limiting instructions:

[3] North Carolina's capital sentencing scheme requires the capital sentencing jury to deliberate on four questions before it can render a sentence of death. First, the jury must unanimously agree that the state has proved at least one aggravating circumstance beyond a reasonable doubt. Second, the jury must decide whether petitioner has proved by a preponderance of the evidence any mitigating circumstances submitted to it by the court. Third, the jury must unanimously determine beyond a reasonable doubt that the mitigating circumstances found to exist do not outweigh the aggravating circumstances found to exist. Finally, the jury must unanimously determine beyond a reasonable doubt that the aggravating circumstances found to exist are sufficiently substantial, when considered in light of the mitigating circumstances found to exist, to warrant the imposition of the death penalty. The jury's recommendation is binding on the judge. N.C. Gen. Stat. §15A-2000 (1977) [App. 27-28].

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*.

Walton v. Arizona, 497 U.S. 639, 653 (1990); *accord Arave v. Creech*, 507 U.S. ___, 123 L.Ed.2d 188, 198 (1993) (sentencing judge, unlike jury, presumed to know and apply any existing narrowing construction). In the case *sub judice*, petitioner's jury was not properly instructed for two independent reasons. First, the trial court failed to limit the application of this factor to petitioner's personal conduct and and mental state. Second, the trial court defined the "especially heinous, atrocious or cruel" aggravating circumstance using language found unconstitutional by this Court. Each ground separately violated his Eighth and Fourteenth Amendment rights.

B. The Challenged Instructions Prevented This Factor From Constitutionally Narrowing The Class Of Death Eligible Defendants.

Before North Carolina, or any other authority, may exact the death penalty, the Constitution requires a determination that the penalty is "directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 320 (1989). Capital punishment "must be tailored to [the defendant's] personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982). The death penalty may not be constitutionally imposed on petitioner, a severely retarded individual with the capacity of a nine-year old who was easily influenced by others, based on the culpability of others. *Id.* at 798 (reversing death sentence where state "attributed to Enmund the culpability of those who killed [victims]").

"A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." *Tison v. Arizona*, 481 U.S. 437, 156 (1987). The evidence that petitioner possessed any intent to act with especial heinousness, atrocity, or cruelty does not rise to the constitutional minimum. The jury found he did not intend to kill. [App. 29, 71] Given his significantly impaired mental condition and retardation, he was a follower and not a leader. [App. 31, 32] Most importantly, he lacked the capacity to understand the results of actions. The lower court resolved this issue on the merits, but focused on petitioner's presence at the scene and participation in the killing. Critically, it ignored petitioner's lack of intent to kill at all, much less his intent to kill in an especially heinous, atrocious, or cruel manner. *State v. McCollum*, 334 N.C. at 220-22, 433 S.E.2d at 150-51. Moreover, the trial court's instructions on this factor, which is expressly vague and overbroad on its face, told the jury only to consider if "the murder" was especially heinous, atrocious, or cruel, rather than whether such especial depravity could be attributed specifically to petitioner. [App. 42-43]

Here, the jury's own verdict in the guilt phase of trial should have precluded submission of this aggravating circumstance. The jury found petitioner guilty only under felony-murder rule; it declined to convict him of an intentional murder with premeditation and deliberation. [App. 71] In so doing, the jury rejected that petitioner "intentionally killed the victim, or that he intended that she be killed . . . and that he acted with malice after premeditation and deliberation." These resolutions of crucial evidential matters weigh heavily in petitioner's favor with respect to the adequacy of the instructions on this inherently vague and constitutionally suspect factor.

The constitutional requirement of individualized consideration precludes the death penalty based on the heinous, atrocious or cruel acts of persons other than

petitioner. *Tison v. Arizona*, 481 U.S. at 155-58; *Enmund v. Florida*, 458 U.S. at 798. The trial court's instructions were misleading on this point, since they directed the jury to consider whether "this murder [was] especially heinous, atrocious, or cruel," rather than whether the petitioner's own conduct was such. Petitioner objected to this instruction without success. Moreover, in his closing argument, the prosecutor explained the law and avoided any requirement of a link between what petitioner did and the aggravating factor. The prosecution's evidence of heinousness related to conduct of persons other than petitioner. Its primary evidence -- petitioner's custodial statement -- indicated other persons were responsible for the heinous aspects of this murder. Petitioner never expressly adopted the heinous actions or intentions of Darrell Suber and Chris Brown. They never articulated their evil designs. His level of participation was also too minimal to bring him within the ambit of their actions within the meaning of *Tison*. In such circumstances, there was no basis for submission of this aggravating circumstance. *See Lankford v. Idaho*, 500 U.S. ____, 114 L.Ed.2d 173, 186 (1991) (doubting correctness of submission of especially heinous, atrocious, or cruel aggravating circumstance if defendant not actual killer). Using this aggravating circumstance on these facts failed to give it a constitutionally narrow interpretation required by *Zant*.

C. The Instructions To Petitioner's Jury Did Not Limit The Valuge Aggravating Factor Because They Used Unconstitutional Definitions Of Heinous, Atrocious, And Cruel.

The statutory provision for aggravating factor in this case states: "The capital felony was especially heinous, atrocious, or cruel." N.C. Gen. Stat. §15A-2000(e)(9). [App. 28] Standing alone, its language is vague and meaningless under the Eighth

Amendment because it gives no guidance to the sentencer since an ordinary person could honestly believe any intentional, unjustified taking of a human life is especially heinous, atrocious, or cruel. *Walton*, 497 U.S. at 654; *Cartwright*, 486 U.S. at 364. If petitioner's sentencer received no additional limiting guidance regarding application of this factor, then his death sentence is unconstitutional.

Following the current North Carolina Pattern Jury Instructions, *see* N.C.P.I.--Crim. 150.10,[4] the trial court explained this factor to petitioner's jury as follows:

> Issue two -- or aggravating circumstance two, : was this murder especially heinous, atrocious or cruel?
>
> In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was

[4] All North Carolina trial judges routinely use the Pattern Jury Instructions. Thus, the error will consistently recur when this aggravating factor is submitted to a sentencing jury. This aggravating factor is the one most frequently submitted to capital sentencing juries in North Carolina. See Exum, *The Death Penalty in North Carolina*, 8 Campbell L. Rev. 1, 7, 19-21 (1985) (cases compiled by author, who is Chief Justice of the Supreme Court of North Carolina); *see also State v. Stokes*, 319 N.C. 1, 22-24, 352 S.E.2d 653, 665-66 (1987) (compiling capital cases where this factor submitted). The issue raised here is of great importance to North Carolina's capital-punishment scheme. *See Mills v. Maryland*, 486 U.S. 367, 373 (1988) (certiorari granted "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme").

unnecessarily torturous to the victim.

[App. 43-44] These instructions were unconstitutionally vague and violated the Eighth Amendment.

The second paragraph of these instructions offered no guidance to a sentencing jury, as this Court has expressly concluded and most recently reaffirmed. *Creech*, 507 U.S. at ___, 123 L.Ed.2d at 199 (citing *Shell*, *Cartwright*, and *Godfrey*). The challenged instructions are virtually identical to those found unconstitutional in *Cartwright*.[5] Contrary to the decision of the Supreme Court of North Carolina, this language provided no constitutionally sufficient guidance to petitioner's jury.

D. The Instructions To Petitioner's Jury Did Not Limit Application Of The Unconstitutional Vague Aggravating Factor By Using The Equally Vague Concept Of Brutality.

The last paragraph of these instructions is equally insufficient to cure the

[5] *Cartwright* invalidated an aggravating circumstance identical to North Carolina's where the sentencing instruction on Oklahoma's "especially heinous, atrocious or cruel" factor provided no guidance to the jury. *Cartwright*, 486 U.S. at 363-64. The trial judge had instructed the jury that:

> The term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 356 (1988). The Tenth Circuit held the words "heinous", "atrocious" and "cruel" did not on their face offer sufficient guidance to the jury to escape the strictures of Furman and its progeny. This Court unanimously affirmed because the "especially heinous, atrocious or cruel" language gave no more guidance to the jury than the language found constitutionally deficient in *Godfrey*. 486 U.S. at 364; *accord Shell*, 112 L.Ed.2d at 4. The instructions defined "heinous" as "extremely wicked or shockingly evil". [App. 42] *State v. Syriani*, 333 N.C. at 391, 428 S.E.2d at 140. This definition is constitutionally impermissible. *Shell*, 112 L.Ed.2d at 4-5 (Marshall, J., concurring). The same is true with respect to the instructions on the term "atrocious". In this case, the trial court defined the term "atrocious" as "outrageously wicked and vile". [App. 42] *State v. Syriani*, 333 N.C. at 391, 428 S.E.2d at 140. This instruction, again like the instructions in *Cartwright* and *Shell*, is unconstitutionally vague. *Shell*, 112 L.Ed.2d at 4-5 (Marshall, J., concurring); *Cartwright*, 486 U.S. at 364.

vagueness of this aggravating factor. It explained that for the murder to have been especially heinous, atrocious, or cruel either

> any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

[App. 42-43] The lower court has concluded "these jury instructions incorporate[d] narrowing definitions . . . expressly approved by the United States Supreme Court, are of the tenor of the definitions approved" and therefore "provide[d] constitutionally sufficient guidance to the jury." *See State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141 (1993). This conclusion misapplied the controlling precedents of this Court.

The language that in an especially heinous, atrocious, or cruel murder "any brutality which was involved in it must have exceeded that which is normally present in any killing" did not adequately guide petitioner's jury. [App. 43] The ordinary, lay juror has no frame of reference in which to evaluate what facts or level of brutality is "normally present" in a given homicide. "A person of ordinary sensibility could fairly characterize almost every murder as" brutal. *Cf. Godfrey*, 446 U.S. at 429. If one or more of members of petitioner's jury subscribed to this view, the trial court's instructions did nothing to dispel this erroneous and unconstitutional conception. This portion of instructions offered no constitutionality limiting guidance in this regard.

This caveat also failed to limit application of the vague especially heinous, atrocious, or cruel factor by having the jury compare the brutality in this case to that "normally present in any *killing*." The Eighth Amendment requires an aggravating factor to "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). That class includes only persons "found guilty of

murder," id., not all killers. If a limiting instruction on heinous, atrocious, and cruel may permit a jury to compare acts in different cases, it must, at a minimum, allow this assessment to include only first degree murders and not all killings. Otherwise, the aggravating factor fails in its constitutional role to "genuinely narrow the class of persons eligible for the death penalty." *Id.* Axiomatically, under the challenged instructions, "the sentencer fairly could conclude that [this] aggravating circumstance applies to every defendant eligible for the death penalty." *Creech*, 507 U.S. at ___, 123 L.Ed.2d at 200 (1993). Creech reaffirmed the principle that "pejorative" terms, such as "vile, horrible, inhuman, heinous, atrocious, and cruel," which "describe the crime as a whole," remain unconstitutional as aggravating factors.[6] The trial court's use of "brutality" in this fashion failed to set constitutional limits on this otherwise facially vague factor.[7]

The word "brutality" describes the crime as a whole, as opposed to the trauma to the victim, and is thus overly broad under *Creech*. In this manner, it is far different from the term "cold-blooded," which describes a perpetrator's "state of mind . . . his attitude toward his conduct and his victim." *Creech*, 123 L.Ed.2d at 199. The North Carolina Supreme Court has been imprecise in deciding whether brutality refers to physical abuse of the victim, while alive or dead, or the perpetrator's state of mind, or both. *See, e.g., State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988) (physical abuse of victim after victim felled and helpless), *vacated on other grounds*, 494 U.S. 1021 (1990);

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[6] Since *Creech* was decided after petitioner's trial and sheds new light on the continuing validity of the unconstitutional vagueness in the "pejorative" terms at issue here, this matter should be remanded for reconsideration in light of the intervening decision. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964); *see Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting).

[7] "Brutal" is in fact used as a synonym or definition for some of these same "pejorative" terms. *See, e.g., People v. Superior Court of Santa Clara County*, 31 Cal.2d 797, 183 Cal.Rptr. 800, 647 P.2d 76, 78 (1982) citing *Webster's New International Dictionary* (Second Edition) (defining "atrocious" as "[s]avagely brutal; outrageously cruel or wicked); *American Heritage Dictionary* (Second College Edition) (defining "brutal" as "characteristic of a brute; cruel; harsh; crude"); *Roget's Thesaurus* (1991 Edition) (using "inhuman" as the lead synonym for "brutal").

State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (defendant's gross mutilation of victims as showing his depravity of mind), *cert. denied*, 459 U.S. 1080 (1982).

The only other state court considering a similar construction of this aggravating circumstance found it unconstitutional. The Utah Supreme Court considered an aggravating finding by the capital sentencer of "ruthlessness and brutality of the murder. . . ." *State v. Wood*, 648 P.2d 71, 85 (Utah 1982). The court held the circumstance invalid under *Godfrey*, "since it describes all murders and therefore fails to provide any guideline for channeling discretion." *Wood*, 648 P.2d at 86. Equating heinous, atrocious, or cruel with "brutality" provides no limiting guidance to a capital sentencing jury. The cruel or brutal nature of a murder concerns the harm wrought upon the victim and describes the crime as a whole, unlike "cold-blooded," which describes a perpetrator's "state of mind . . . his attitude toward his conduct and his victim." *Creech*, 123 L.Ed.2d at 199.

Similarly, the instructions failed to limit this factor by referring to brutality which "exceeded that which is normally present in any killing." Requiring "excessive" brutality adds nothing to the definition of brutal. This Court has rejected as "untenable" a contention that the word "especially" removed any of the vagueness inherent in "heinous, atrocious, or cruel." *Godfrey*, 486 U.S. at 364. The lower court's apparent conclusion to the contrary is erroneous.

Finally, the language that the "murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim" does not save these instructions. The recent decisions in *Creech* and *Walton v. Arizona*, 497 U.S. 639 (1990), do not countence otherwise. *Creech* and *Walton* both involved capital sentencing procedures in jurisdictions where the trial judge makes the sentencing determination. In those situations, the judges are deemed aware of all limiting constructions placed

upon a vague aggravating factor by the applicable state supreme court. *Creech*, 123 L.Ed.2d at 198; *Walton*, 497 U.S. at 653. Indeed, when this Court found the vague aggravating factor "especially heinous, atrocious, or cruel" constitutionally limited by the definition that it is a "consciousless, or pitiless crime which is unnecessarily tortuous to the victim," it relied on the Florida statute making the capital sentence "determined by the trial judge rather than by the jury [because] judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Profitt v. Florida*, 428 U.S. 242, 252 (1976). This Court has never explicitly approved the limiting instruction that an especially heinous, atrocious, or cruel murder is one involving "a consciousless or pitiless crime which was unnecessarily tortuous to the victim" where the jury -- not the judge -- makes the capital sentencing determination. *Cartwright* and *Godfrey* -- not *Creech* and *Walton* -- control where the jury is the capital sentencer, as it is in North Carolina. This case presents this Court an excellent opportunity to articulate the difference between jury sentencing and judge sentencing for the purposes of narrowly defining and applying an admittedly vague aggravating factor in terms of the Eighth Amendment.

Moreover, the jury was given these instructions in the alternative. This disjunctive language is fatal. The constitutionally adequate definition of one term does not save the aggravating circumstance as a whole. *Griffin v. United States*, 502 U.S. ___, ___ 116 L.Ed.2d 371, 382-383 (1991) (general verdict may not be sustained where jury given option of relying upon a legally inadequate theory); *Shell*, 498 U.S. at ___, 112 L.Ed.2d at 4. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction [or verdict] be set aside." *Leary v. United States*, 397 U.S. 6, 31-32 (1969);

see Boyde v. California, 494 U.S. 370, 379-80 (1990) (acknowledging application of this principle in context of capital sentencing by a jury).

The lower court has not consistently applied a narrowing construction of this vague aggravating circumstance, focusing on physical abuse. *See State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979) for this proposition. *Goodman* did not address the adequacy of jury instructions regarding the especially heinous, atrocious, or cruel aggravating circumstance. Rather, the court merely examined the evidence and determined that the brutality involved exceeded that normally present in first degree murders. The court explained,

> [t]he evidence reveals that decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality.

Id. at 26, 257 S.E.2d at 585. This analysis focused on psychological torture, not physical abuse. *See State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (finding this factor supported by evidence that defendant laughed after the killing, showing his depravity of mind), *cert. denied*, 459 U.S. 1056 (1982). The lower court has not limited brutality to physical abuse and did not do so in its instructions *sub judice*.

E. Conclusion.

The instructions given petitioner's jury failed to limit the unconstitutionally vague aggravating factor in violation of the Eighth Amendment. On these facts,

petitioner should not be vicariously responsible for the especial brutality or heinousness of Darry Suber's and Chris Brown's actions where petitioner himself neither killed the victim nor intended her death and did not have the mental capacity for their heinousness attributed to him because of his recklessness. [App. 29, 31-32] The trial court did not limit this aggravating factor to petitioner's conduct or his intentions. The trial court told the jury to consider whether "this murder [was] especially heinous, atrocious, or cruel," not whether petitioner's conduct was so. Furthermore, the instrucitons purporting to explain this factor were constitutionally deficient. In holding to the contrary, the lower court misapplied *Godfrey*, *Cartwright*, and *Shell*. This unconstitutional interpretation is extremely significant to the validity of North Carolina's capital punishment jurisprudence, as was the similar misinterpretation in Mississippi corrected by *Shell*. A writ of certiorari should issue either summarily reversing judgment or allowing plenary review by this Court.

II. PRECLUDING PETITIONER FROM INQUIRING IF PROSPECTIVE JURORS WOULD AUTOMATICALLY VOTE TO RETURN A SENTENCE OF DEATH BECAUSE OF THEIR ATTITUDES ABOUT PAROLE ELIGIBILITY VIOLATED HIS EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has recently granted certiorari in *Simmons v. South Carolina*, No. 92-9059, limited to the questions: (1) whether the failure to inform a capital sentencing jury of Simmons ineligibility for parole on a life sentence violated his due process right to rebut the prosecution's emphasis on the risk of future violence if he was not executed, and (2) whether a capital sentencing jury must be informed of *Simmons* ineligibility for parole on a life sentence as a reason not to impose the death penalty under the Eighth Amendment. Brief for Petitioner at i, *Simmons v. South Carolina*, No.

92-9059. The present case presents a related question: whether petitioner, who is absolutely ineligible for parole consideration for twenty years based on his conviction for murder, who was also convicted of rape and was charged with an especially heinous, atrocious, and cruel murder, may question prospective capital jurors regarding their understanding of his parole eligibility on a life sentence, because of the need for reliability and due process in capital sentencing. Given the virtual certainty that the decision in *Simmons* would provide crucial guidance to the lower court regarding petitioner's claim, this Court should hold this petition pending its decision in *Simmons*. As shown below, if *Simmons* requires an instruction, North Carolina law entitles petitioner to ask jurors if they can follow it.

Prior to jury selection, petitioner moved for permission to question prospective jurors regarding whether their views about parole eligibility would cause them to vote automatically for a death sentence. [App. 72-79] If so, a prospective juror would be excludable for cause. N.C. Gen. Stat. §15A-1212(8) (1977) (unable to render decision in accordance with law). [App. 87] The trial court denied this request and precluded this inquiry. [App. 80-81] The Fourteenth Amendment entitles petitioner to the opportunity to take reasonable steps through the jury selection process to ensure juror impartiality with respect to the imposition of a death sentence. *Morgan v. Illinois*, 504 U.S. ___, 119 L.Ed.2d 492, 502-07 (1992). The undue restrictions imposed upon petitioner's voir dire of potential jurors prevented him from ascertaining whether prospective jurors could fairly and impartially consider a sentence of life given their knowledge, probably erroneous, of his parole eligibility. If prospective jurors, like most citizens, had gross underestimations about when petitioner, especially when he also received a life sentence for the first degree rape for which this same jury convicted him, would have been eligible for parole on a life sentence for first degree murder, they could not fairly consider a life sentence and would vote for death.

Petitioner knew and showed the trial court that prospective jurors likely had inaccurate views about parole eligibility for first degree murder in North Carolina. [App. 73-77] Such misconceptions would be detrimental to their ability and willingness to consider a life sentence and not automatically sentence petitioner to death. Indeed, petitioner demonstrated this fact to the trial court. [App. 74-77] Since petitioner was twenty-seven (27) years old at the time of the proceedings below and would have to serve a minimum of twenty (20) years in prison to even become eligible for parole on a life sentence for first degree murder, he desired to question venire members about it. Given his age and North Carolina's requirement that he serve twenty years before even being eligible for parole, a life sentence for petitioner would likely be one without parole. Petitioner's jurors might well have felt confident in expressing their ability to consider a life sentence under the trial court's instructions despite latent, dogmatic beliefs that petitioner's eligibility for parole, standing alone, is sufficient to justify a sentence of death, especially when they have gross underestimations of when he would be eligible for parole.

Due process entitles a capital defendant to adequate voir dire to ascertain whether prospective jurors would automatically vote to impose a sentence of death. *Morgan v. Illinois*, 504 U.S. ___, 119 L.Ed.2d 492, 502-07 (1992). The trial court precluded petitioner from inquiring whether prospective jurors would be unduly influenced by their knowledge and misconceptions of parole eligibility for a person sentenced to life in prison. This Court will soon decide whether the failure to instruct accurately a capital sentencing jury about a defendant's true parole eligibility violates the Eighth and Fourteenth Amendments. *Simmons v. South Carolina*, No. 92-9059. *Simmons* will determine the constitutionality of refusing to instruct a capital jury regarding the unavailability of parole for a person sentenced to life in prison for first degree murder. If refusing to tell capital jurors the truth about petitioner's parole

eligibility should he receive a life sentence renders his death sentence unreliable or violates due process, then North Carolina must reconsider its prohibition of voir dire inquiries about parole eligibility. This issue is of great importance in all jurisdictions where an indeterminate life sentence, with parole eligibility only after a substantial period of incarceration, is the only alternative to death as a sentence for first degree murder.

The North Carolina Supreme Court summarily rejected this claim on the merits. [App. 18] *State v. McCollum*, 334 N.C. 208, 238-39, 433 S.E.2d 144, 161 (1993). This resolution was consistent with its earlier position. *See State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *vacated on other grounds*, 494 U.S. 1050 (1990), *remanded for resentencing*, 327 N.C. 388, 395 S.E.2d 106 (ordering new sentencing hearing), *cert. denied*, 499 U.S. 113 L.Ed.2d 459 (1991). Its analysis hinged on the lower court's longstanding position that information about parole is irrelevant to the capital sentencing decision. *McNeil*, 324 N.C. at 42-44, 375 S.E.2d at 915-16; *accord State v. Price*, 326 N.C. 56, 83-84, 338 S.E.2d 84, 99-100, *vacated and remanded on other grounds*, 498 U.S. 802 (1990), *aff'd on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded on other grounds*, ___ U.S. ___, 122 L.Ed.2d 113, *aff'd on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993). *McNeil* disallowed similar voir dire "because parole eligibility is irrelevant to a sentencing determination" and a trial court is not "constitutionally required to inform the jury about parole procedures in order to dispel the misconceptions most jurors have about parole." 324 N.C. at 44, 375 S.E.2d at 916. Thus, the lower court's premise is constitutionally suspect and will be examined in *Simmons*. The *Simmons* decision will have a direct impact on petitioner's claim, particularly since he is entitled, as a matter of state law, to question prospective jurors about any instruction they will be given. *E.g., State v. Hedgepeth*, 66 N.C. App. 390, 393-99, 310 S.E.2d 920, 922-25 (1984) (reversible error to preclude defendant from

asking prospective jurors if they would be willing and able to follow judge's instructions limiting their consideration of his prior criminal record only to the issue of credibility). Because *Simmons* potentially alters the constitutionality of North Carolina's practice as applied in this case, this matter should be held pending that decision.

The recent decision in *Morgan* dispels two important misapprehensions in the lower court's analysis. First, due process entitles petitioner to make inquiries of a prospective capital juror beyond his naked assertion that he can follow the law. Petitioner may, therefore, make inquiries during voir dire to gauge the juror's disposition toward the law, particularly the requirements that the state prove at least one factor in aggravation to make a death sentence a constitutional possibility, that prospective jurors be willing and able to consider all relevant mitigating evidence petitioner might proffer as a basis for a sentence less than death, and that prospective jurors have no latent attitudes about a life sentence that would prevent them from fairly considering it as a sentencing option. *Morgan*, 119 L.Ed.2d at 502-06. Second, the limitations on voir dire may not be delegated to the trial court's discretion. Where constitutional rights are at issue, appellate review must be readily available. *Id.* at 503. The lower court failed to give petitioner this full review.

Petitioner was entitled as a matter of constitutional law to an impartial jury. *See Lockhart v. McCree*, 476 U.S. 162, 168 (1986). Ancillary to this right was the opportunity to take reasonable steps, primarily through the voir dire process, to insure juror impartiality. *Rosales-Lopez v. United States*, 421 U.S. 182, 188 (1981). "[P]art of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan*, 119 L.Ed.2d at 503. Although wide discretion is accorded trial judges in the conduct of voir dire, that discretion is not unfettered. *Id.*; *Darbin v. Nourse*, 664 F.2d 1109, 1112-1115 (9th Cir. 1981); *United States v. Lewin*, 467

F.2d 1132, 1138 (7th Cir. 1972). The primary purpose of inquiry during voir dire is to eliminate extremism and partiality. Limitations on voir dire examination tending to create an unreasonable risk of bias or prejudice infecting petitioner's trial and sentencing violate due process. *Morgan*, 119 L.Ed.2d at 500-02; *see, e.g., Turner v. Murray*, 476 U.S. 20, 37 (1986); *Hamm v. South Carolina*, 409 U.S. 524, 527 (1973); *but see Mu'min v. Virginia*, 500 U.S. ___, 114 L.Ed.2d 494 (1991) (trial court not required to ask "content" questions in voir dire to determine whether prospective jurors could be fair and impartial despite having been exposed to some pretrial publicity concerning case).

It is particularly significant that the unreasonable restraints imposed by the trial court occurred in a capital case. In *Morgan*, this Court noted it has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." 119 L.Ed.2d at 503. Capital juries are entrusted to render a "highly subjective 'unique, individualized judgement regarding the punishment that a particular person deserves.'" *Caldwell v. Mississippi*, 472 U.S. 320, 340-41 n.7 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)). A capital defendant's right to an impartial jury, obtained primarily through the jury selection process, must be closely safeguarded. By their very nature, capital cases often involve crimes far more repugnant than those crimes involved in non-capital cases. A far greater likelihood exists that biases and prejudices may operate undetected in capital cases. *Turner*, 476 U.S. at 35. Petitioner was denied his ability to question prospective jurors fully as to their fairness and impartiality. This denial unconstitutionally limited "petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt." *Morgan*, 119 L.Ed.2d at 505-06.

This issue is important to capital punishment jurisprudence in light of *Morgan* and the pending decision in *Simmons*. Review of this question is appropriate. At the very least, this matter should be held pending the decision in *Simmons* for disposition consistent with it.

III. THE FAILURE TO SEAT PROSPECTIVE AFRICAN-AMERICAN JURORS AS A REMEDY FOR AND CURE OF THE FREQUENT USE OF RACIALLY MOTIVATED PEREMPTORY CHALLENGES BY THE PROSECUTOR DENIED PETITIONER AND THE EXCLUDED VENIREMEMBERS THEIR RIGHTS TO EQUAL PROTECTION.

During jury selection in petitioner's case, the prosecutor exercised three consecutive peremptory challenges on prospective African-American jurors. Petitioner who is also African-American, objected and argued the prosecutor's peremptory challenges established a prima facie case of racial discrimination in the jury selection. *E.g., Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor articulated purported nondiscriminatory bases for his strikes. [App. 87-90] Unpersuaded by this effort, the trial court ruled in favor of petitioner and found the prosecutor's method of asking questions, his tone of voice, and his articulated reasons revealed discriminatory motivations. The trial court ruled "the [petitioner] made a prima facie showing of the inference of purposeful discrimination." [App. 96-98] Petitioner urged the trial court to seat the improperly struck veniremembers. The trial court declined, however, to seat the improperly removed individuals and instead ordered the selection process begin anew with forty different prospective jurors. [App. 97-98]

Under the Fourteenth Amendment, a defendant has a right to a jury selected without racial discrimination. *Batson v. Kentucky*, 476 U.S. at 86. According to the trial

court's own findings, the prosecutor violated petitioner's right by using peremptory challenges in a racially discriminatory manner. [App. 96-97] The trial court was therefore "under an affirmative duty to enforce the strong statutory and constitutional policies embodies in th[e] prohibition" against discrimination in the jury selection. *Powers v. Ohio*, 499 U.S. ___, 113 L.Ed.2d 411, 428 (1991). When such discrimination occurs, the court errs unless it both recognizes it and takes meaningful remedial measures. Otherwise, the prohibition on such discrimination would amount to no more than a right without a remedy. *See, e.g., Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803) ("One of the first duties of government" is to provide a "remedy for the violation of a vested legal right"). The remedy used below was inadequate for two reasons. First, it failed to protect petitioner's equal protection right to a jury selection process free of racial discrimination. Second, it rendered the veniremembers right to serve on a jury free of racial discrimination a nullity.

Petitioner raised this issue on appeal. The court below rejected it on the merits. *State v. McCollum*, 334 N.C. at 235-36, 433 S.E.2d at 158-60. The court's analysis hinged on two considerations. First, it noted this Court in *Batson* left implementation of that decision to the states. Second, it felt no prospective juror who had been challenged could then be seated and not be prejudiced toward a party. While this Court left the procedures to the states in *Batson*, it has since explained in *Powers* that the prospective juror's right to serve is also implicated by racially motivated peremptory challenges. The only method for vindicating the prospective juror's right is to seat her. The time has come for this Court to address the adequacy of the remedy for a *Batson* violation in light of *Powers*. To the extent a prosecutor wants to avoid alienating an African-American he challenges, he should simply exercise the challenge at the bench. Any necessary inquiry and ruling by the trial court may proceed without knowledge of the affected veniremembers.

The court's refusal to seat the two jurors failed to remedy the violation of petitioner's right to equal protection. The only remedy that adequately protects this right is seating the improperly struck jurors. *See United States v. Forbes*, 816 F.2d 1006, 1011 (5th Cir. 1987) (to remedy prosecutorial misconduct before trial "simply . . . seat [ ] the wrongfully struck venireperson"); *Jefferson v. State*, 595 So.2d 38, 40 (Fla. 1992) (the "remedy of seating the improperly challenged juror is in greater accord with judicial economy and the advancement of public confidence in our system of justice"); *see Joiner v. State*, 618 So.2d 174, 175 (Fla. 1993) (inadequate *Batson* remedy to replace minority juror improperly struck with another minority member); *but see Gilchrist v. State*, 627 A.2d 44, 55 (Md. App. 1993) (trial court cures *Batson* violation by defendnat by beginning jury selection again). This division of authority among at least four jurisdictions demonstrates the need for review by this Court.

By seating the challenged jurors, a court deters the prosecutor from discriminating in jury selection and promotes and protects petitioner's right to be tried by a jury selected without racial bias. Calling a new pool does not deter the prosecutor, because he may simply continue discriminating. The game will continue until the process results in a racial mix acceptable to the state. Without a deterrent, the state has no reason to stop playing. Indeed, calling for a new venire "may exacerbate rather than alleviate the constitutional violation." *Joiner v. State*, 618 So.2d at 175.

The importance of the deterrent effect of a Batson remedy can hardly be overstated. Racial discrimination in jury selection is often subtle and difficult to discern. It may often operate undetected absent careful oversight. For these reasons, courts routinely reject purportedly race-neutral explanations grounded in subjective judgments. *Batson* itself acknowledged that speculative hunches could not rebut a prima facie case. *See, e.g., People v. Harris*, 544 N.E.2d 357 (Ill. 1989) (reasons based on

demeanor rejected); *Avery v. State*, 545 So.2d 123 (Ala. Cr. App. 1988) (most closely scrutinize reasons about juror's attitude as susceptible to abuse). Those of a mind to discriminate because of another's race will do so without fear of retribution if the remedy for such misconduct is not swift and direct.

If litigants know the remedy is the seating of a juror they have improperly struck, they will be more hesitant to engage in discriminatory behavior than if they know the remedy will only be the clean slate of a new venire. This lesser remedy also encourages those of a mind to discriminate to do so in hopes of eliminating or diluting African-American presence from the pool of jurors available in a particular court session. Depending on the mechanics of jury service and the vagaries of chance, a party may feel he can eliminate the target class of citizens before the remedy of an ew panel is imposed.

An effective remedy for discrimination in jury selection through seating excluded jurors is necessary to protect not only the rights of the petitioner, but also the rights of affected jurors. Powers recognized veniremembers have "the right not to be excluded [from jury service] on account of race." *Powers v. Ohio*, 113 L.Ed.2d at 424; *accord Batson v. Kentucky*, 476 U.S. at 87; *Georgia v. McCollum*, 505 U.S. ____, 120 L.Ed.2d 33, 49 (1992). The prospective juror excluded "because of race suffers a profound personal humiliation heightened by its public character." *Powers v. Ohio*, 113 L.Ed.2d at 427.

> The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securuing to individuals of the race that equal justice

which the law aims to secure to all others.

Strander v. West Virginia, 100 U.S. 303, 308 (1880). Protection of an individual juror's right to be free of "open and public racial discrimination," *Georgia v. McCollum*, 120 L.Ed.2d at 44, requires that improperly excluded jurors be seated. Otherwise, there is no practical device for redressing each person's right to serve on a jury free of being striken for racially discriminatory reasons." *Joiner v. State*, 618 So.2d at 176. Beginning jury selection with a new venire wholly failed to address the purposeful and inexcusable discrmination wrought on the two veniremembers below. Only seating them vindicates their rights protected by *Powers*.

In addition, seating a juror excluded for discriminatory reasons serves to maintain the public's confidence in the judicial system. "One of the goals of our jury system is 'to impress upon the criminal defendant and the community as a whole that a verdict . . . is given in accordance with the law by persons who are fair.'" *Georgia v. McCollum*, 120 L.Ed.2d at 45 (quoting *Powers v. Ohio*, 113 L.Ed.2d at 426). If a court fails to provide a meaningful remedy for prosecutorial discrimination, it tends to "undermine the very foundation of our system of justice -- our citizens' confidence in it." *Georgia v. McCollum*, 120 L.Ed.2d at 45.

The dimension of this issue is enormous.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendnat and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public conference in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal

justice which the law aims to secure to all others."

Batson v. Kentucky, 476 U.S. at 87-88 (citations omitted; brackets in original). Thus, discrimination in jury selection undermines important public interests, as well as fundamental rights of the petitioner and the affected jurors. The same is true when, as here, discrimination is recognized but not corrected. It is for this very reason that such an error should not be subject to harmless-error analysis. *See Batson v. Kentucky*, 476 U.S. at 100; *see also Gray v. Mississippi*, 481 U.S. 648, 660, 668-669 (1987) (opinions of Blackmun, J., and Powell, J.) (improper exclusion of juror in death penalty case is not subject to harmless error analysis); Paul H. Schwartz, *Equal Protection in Jury Section? The Implementation of Batson v. Kentucky*, 69 N.C. L. Rev. 1533, 1573-74 (1991).

The appropriate remedy not only to cure, but also to prevent racially motivated jury selection practices presents an important federal constitutional issue. The rights of defendants, like petitioner, and of the many qualified but racially excluded veniremembers, like the two African-Americans against whom the prosecutor below discriminated because of their race, are at stake. The division among the many jurisdictions making an evaluation of potential remedies suggests the time has come for this Court to consider the matter. Accordingly, a writ of certiorari should issue.

IV. DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL PROHIBIT THE USE OF AGGRAVATING FACTORS BASED ON CONDUCT FOR WHICH THE JURY HAS ACQUITTED PETITIONER IN THE GUILT PHASE OF THE PROCEEDINGS WHEN THE PROSECUTION IS REQUIRED TO PROVE THE SAME FACTS BEYOND A REASONABLE DOUBT TO OBTAIN THE DEATH SENTENCE.

Petitioner's jury acquitted him of premeditated murder with a specific intent to

kill. [App. 71] Nevertheless, the trial court allowed the jury to find two aggravating circumstances that required the state to prove, beyond a reasonable doubt, that petitioner specifically intended the purposeful killing of Sabrina Buie. The court below rejected petitioner's double jeopardy and collateral estoppel challenges to this process. A writ should issue because petitioner's death sentence resulted from a violation double jeopardy and collateral estoppel proscribed by the United States Constitution. U.S. Const., amends. V, VIII, XIV. The decision below departs severely from this Court's precedent. *E.g., Arizona v. Rumsey*, 467 U.S. 203 (1984); *Bullington v. Missouri*, 451 U.S. 430 (1980); *Benton v. Maryland*, 395 U.S. 784 (1969); *Green v. United States*, 35 U.S. 184 (1957). The Court should grant the writ to correct the misinterpretation of those decisions.[8]

The dispositive event in this case occurred when the jury returned its verdict at the close of the *guilt phase*. Petitioner was charged with murder in a general indictment. Such an indictment will support convictions for first degree murder based on premeditation and deliberation and on felony murder. *See State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970). The state claimed petitioner should be found guilty of both premeditated and deliberate murder with a specific intent to kill and felony murder. The prosecutor specifically argued to the jury that it should find petitioner guilty of a first degree murder based on a killing after premeditation and deliberation and a first degree murder based on a killing during the course of a felony. [App. 99-101] The trial court instructed the jury on both types of first degree murder, explicitly telling the jury it could convict petitioner of both premeditated and deliberate murder and felony murder. [App. 102] The verdict form allowed the jury to find petitioner guilty of premeditated and deliberate murder and/or felony murder, or guilty of second degree murder, or not guilty. [App. 71] The jury convicted petitioner only of felony murder.

[8] This Court is considering a similar question in *Schiro v. Clark*, No. 92-7549.

Since the jury was only presented with a single "not guilty" answer that covered all three possible guilty verdicts, the only way for the jury to demonstrate it found petitioner guilty of felony murder and not guilty of premeditated and deliberate murder was to answer "yes" to felony murder and make no written response to premeditated murder. It did so.

After deliberating for a long period, the jury returned a single verdict: it found petitioner guilty of felony murder. It impliedly acquitted him of premeditated and deliberate murder, the only charge which required proof of a specific intent to kill. [App. 71] The jury specifically found petitioner did not intend to kill. These verdicts are important in this case because the two aggravating factors upon which the death sentence rested required the state to prove beyond a reasonable doubt that the killing was intentionally committed.

A silent verdict is the legal equivalent of an acquittal. This Court's jurisprudence compels the conclusion that the jury made an implied acquittal. In *Green*, the defendant was charged with first degree murder. The jury convicted him of the lesser offense of second degree murder, but was silent as to the first degree murder charge. Green's conviction of second degree murder was reversed on appeal due to trial error. He was subsequently convicted of the original first degree murder charge. Double jeopardy barred retrial on that charge.

> [T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. *Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an*

> *end when the jury was discharged so that he could not be retried for that offense . . . . In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."*

Green v. United States, 355 U.S. at 191 (emphasis added). As in *Green*, the jury's verdict must be interpreted as though it expressly stated: "We find the defendant not guilty of murder with a specific intent to kill formed after premeditation and deliberation but find him guilty of felony murder."

In this case, the trial court submitted two aggravating circumstances: a murder for the purpose of avoiding or preventing a lawful arrest and an especially heinous, atrocious, and cruel murder. [App. 37] Both require proof of a specific intent to kill under North Carolina law. The jury's implied acquittal of petitioner for an intentional murder should preclude submission of these factors.

Before the former circumstance may be submitted under North Carolina law, "there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was *defendant's* desire to avoid subsequent detection and apprehension for the crime." *State v. Goodman*, 298 N.C. 1, 27, 257 S.E.2d 569, 586 (1979) (emphasis added); *see State v. Williams*, 304 N.C. 394, 425, 284 S.E.2d 437, 456 (1981) (applying *Goodman*). The jury's own verdict should have precluded submission of the aggravating circumstance of murder to avoid arrest. The jury found petitioner guilty only of felony murder; it acquitted him of intentional murder with premeditation and deliberation. [App. 71] In so doing, the jury rejected the argument that petitioner "intentionally killed the victim, or that he intended that she be killed . . . and that he acted with malice after premeditation and deliberation." The "purpose" of the avoiding-arrest circumstance must be the petitioner's *own* purpose under *Goodman*. This

principle is illustrated plainly and simply by the differing analysis applied to the two defendants in an early North Carolina case. Just as with the aggravating circumstance of avoiding arrest, the acquittal of intentional murder should preclude submission of the aggravating circumstance of "especially heinous, atrocious or cruel" murder. The constitutional requirement of individualized consideration precludes the death penalty based on the heinous, atrocious or cruel acts of persons other than petitioner. *See Enmund v. Florida*, 458 U.S. 782, 789 (1982). Here, the evidence as to heinousness related to conduct of persons other than petitioner. The primary evidence showed Darrell Suber and Chris Brown, not petitioner, were responsible for the heinous aspects of this murder. In such circumstances, there was no basis for submitting this aggravating circumstance. *See Lankford v. Idaho*, 500 U.S. ___, 114 L.Ed.2d 173, 186 (1991) (doubting correctness of submission of aggravating circumstance of especially heinous, atrocious or cruel if defendant was not the actual killer). Moreover, the jury's rejection of petitioner's specific intent to kill in acquitting him of intentional murder bars reliance on this factor.

The historical underpinnings of the double jeopardy prohibition are most eloquently described in *Green*.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187. These considerations apply to the capital sentencing process:

> The "embarrassment, expense and ordeal" and the

> "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,". . . thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear "almost the entire risk of error."

Bullington v. Missouri, 451 U.S. at 446 (citation omitted).

It is well established that the penalty phase of a capital trial, whether it be before judge or jury, is a "trial" for double jeopardy purposes. *See Arizona v. Rumsey*, 467 U.S. 203 (1984). The facts here are even more compelling since petitioner was acquitted at the guilt phase of his trial. Petitioner was twice put in jeopardy on the issue of intent: at the guilt phase and at the penalty phase. Double jeopardy protections forbid this result.

Collateral estoppel similarly applies to criminal prosecutions as an element of the double jeopardy clause. *See Ashe v. Swenson*, 397 U.S. 436, (1970). The doctrine of collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 (1979) "[Collateral estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit." *Ashe v. Swenson*, 397 U.S. at 443. The doctrine of collateral estoppel bars the imposition of the death penalty since petitioner's jury acquitted him of premeditated or intentional murder at the guilt phase. Obviously, the parties were the same for both the guilt and penalty trials. The state's evidence at

the penalty phase consisted solely of incorporating all of the evidence presented at the guilt phase. Through use of the guilt phase evidence it had presented on petitioner's intent to kill, the prosecutor urged the sentencer to sentence him to death. But the jury had found the state failed to prove this intent to kill. Collateral estoppel bars the state from forcing petitioner to run the gauntlet a second time. A writ should issue to review this question.[9]

[9] This Court has a similar issue pending in *Schiro v. Clark*, No. 92-7549. This matter may be held pending disposition of that case.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that writ of certiorari issue to review this decision of the Supreme Court of North Carolina and that the judgment below be summarily reversed.

This the 17th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender

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COUNSEL OF RECORD

IN THE SUPREME COURT OF NORTH CAROLINA

No. 2A92 — Cumberland County

State of North Carolina

v

Henry Lee McCollum

Death Case

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court, Cumberland County. Upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Burley B. Mitchell, Jr., Associate Justice, be certified to the said Superior Court to the intent that proceedings be had therein in said cause according to law as declared in said opinion.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Three Hundred Forty-two and 60/100 dollars ($342.60), and execution issue therefor.

Certified to the Superior Court, Cumberland County, this 19th day of August, 1993.

A TRUE COPY

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

By: Peggy R. Byrd
Assistant Clerk

A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Peggy R. Byrd
ASSISTANT CLERK
2 November 19 93

STATE of North Carolina

v.

Henry Lee McCOLLUM.

No. 2A92.

Supreme Court of North Carolina.

July 30, 1993.

On retrial after remand, 321 N.C. 557, 364 S.E.2d 112, defendant was convicted in the Superior Court, Cumberland County, Thompson, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Mitchell, J., held that: (1) evidence warranted instructions on aggravating circumstances; (2) any errors were not prejudicial; (3) jury could reject uncontradicted expert testimony; (4) defendant was not deprived of right to speedy trial; (5) defendant's mental retardation did not make confession involuntary; and (6) sentence was not disproportionate.

Affirmed.

Exum, C.J., concurred in part and dissented in part and filed opinion in which Frye, J., joined.

1. Homicide ⇐311

Before court may instruct jury at capital sentencing hearing on aggravating circumstance that capital felony was committed for purpose of avoiding or preventing lawful arrest, there must be substantial competent evidence from which jury can infer that at least one of defendant's purposes for the killing was desire to avoid subsequent detection and apprehension for crime. G.S. § 15A-2000(e)(4).

2. Homicide ⇐311

Evidence warranted instruction at capital sentencing hearing on aggravating circumstance that capital felony was committed for purposes of avoiding or preventing lawful arrest, where after defendant and other males had raped 11-year-old victim, coperpetrator said, "we got to kill her to keep her from telling the cops on us," and in response defendant and another man held child's arms while victim's panties were forced down her throat with a stick until she was dead; defendant's actions were evidence of his adoption of stated motive for killing child. G.S. § 15A-2000(e)(4).

3. Homicide ⇐358(1)

Jury at sentencing phase of trial for capital murder could find that one purpose motivating killing was defendant's desire to avoid subsequent arrest as aggravating circumstance in support of imposing death penalty, even though at guilty phase jury had not answered yes in space provided on verdict form asking whether defendant intentionally killed victim or intended that she be killed; failure to answer did not amount to "acquittal." G.S. § 15A-2000(e)(4).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐893

Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes.

5. Homicide ⇐311

Court was not required to instruct jury at capital sentencing hearing that it could find aggravating circumstance of murder which was heinous, atrocious, or cruel only if finding was supported by defendant's own conduct, where defendant actively participated in murder by holding arms of 11-year-old child he and coperpetrators had just raped and sodomized so that another coperpetrator could carry out expressly stated intent to kill the child. G.S. § 15A-2000(e)(9).

6. Criminal Law ⇐1213.8(8)

Instruction at capital sentencing hearing, that death penalty could be imposed if state proved beyond reasonable doubt that defendant was major participant in underlying felony and exhibited reckless indifference to human life, correctly stated Eighth Amendment requirements for imposition of death penalty on defendant who aided and abetted commission of felony in course of which murder was committed by others. U.S.C.A. Const.Amend. 8.

7. Constitutional Law ⇐268(8)
Criminal Law ⇐723(1)

Prosecutor's closing argument did not deny defendant due process during capital sentencing hearing, even though prosecutor on several occasions asked jurors to imagine that murder victim was their child; prosecutor's arguments did not manipulate or misstate evidence and did not implicate other specific rights of defendant such as right to counsel or right to remain silent, and, moreover, court sustained objections to argument and instructed jurors to make decision on basis of evidence alone and that arguments were not evidence. U.S.C.A. Const.Amend. 14.

8. Criminal Law ⇐723(1)

Counsel is generally allowed wide latitude in jury argument during capital sentencing proceeding, and for defendant to receive new sentencing proceeding, prosecutor's comments must have so infected trial with unfairness as to make resulting conviction denial of due process. U.S.C.A. Const.Amend. 14.

9. Criminal Law ⇐723(1)

In capital sentencing proceeding, counsel may argue facts which have been presented as well as reasonable inferences which can be drawn therefrom.

10. Criminal Law ⇐723(1)

During capital sentencing proceeding, argument asking jurors to put themselves in place of victims will not be condoned.

11. Criminal Law ⇐728(2)

Prosecutor's remarks regarding impact of murder victim's death on her father and fact that father wanted revenge were not so grossly improper as to require court to intervene ex mero motu during capital sentencing hearing.

12. Criminal Law ⇐1037.1(1)

If party fails to object to closing argument, reviewing court must decide whether argument was so improper as to warrant intervention by trial judge ex mero motu, and standard of review is one of gross impropriety.

13. Criminal Law ⇐723(1)

Prosecutor's statement during argument in capital sentencing proceeding that jurors themselves were not imposing death penalty did not tend to diminish jury's responsibility; statement informed jury that its recommendation would be binding and did not suggest to jurors that they could depend upon judicial or executive review to correct errors in their verdict. G.S. § 15A-2000(b).

14. Criminal Law ⇐723(1)

In capital sentencing proceeding, court is required to censor remarks not warranted either by law or by the facts.

15. Criminal Law ⇐730(14)

Court cured any error in prosecutor's statement during capital sentencing proceeding that jury's decision should be made with reference not just to evidence but also to desires of their community by immediately sustaining defendant's objection to the statement.

16. Criminal Law ⇐723(1)

Prosecutor's remarks reminding jury that for purposes of trial it acts as voice and conscience of community are permissible.

17. Criminal Law ⇐728(2)

Prosecutor's remark that jury should weigh each individual mitigating circumstance against all aggravating circumstances was not so grossly improper as to require court to intervene ex mero motu.

18. Criminal Law ⇐720(9)

Prosecutor's remark during closing argument in capital sentencing proceeding that defendant's expert psychologist had waited seven years to examine defendant was not improper attempt to alert jury to fact that defendant had been tried on previous occasion, but rather, was permissible challenge to accuracy of expert's conclusions in light of time which had passed between crime and examination.

19. Criminal Law ⇐720(9)

In capital sentencing proceeding, prosecutor's challenge to accuracy of conclusions of defendant's expert psychologist

was reasonable inference drawn from evidence presented at hearing regarding length of time which had passed between commission of crime and expert's first examination of defendant.

20. Criminal Law ⇐723(1)

Prosecutor's remarks during closing argument at capital sentencing proceeding, that aggravating circumstances outweighed mitigating circumstances and that this was most cruel, atrocious, and heinous crime jury would ever come into contact with, were proper in light of prosecutor's role as zealous advocate, rather than improper statements of prosecutor's personal opinion.

21. Homicide ⇐358(1)

Photographs of murder victim's body were properly admitted in capital sentencing proceeding for limited purpose of illustrating testimony of medical examiner and investigator, despite contention that probative value of photographs was substantially outweighed by tendency to inflame jury; stick and pair of panties had been found in victim's throat, and photographs were used by medical examiner to illustrate testimony concerning cause of death and by investigator to explain his collection and retrieval of panties from victim's windpipe. Rules of Evid., Rule 403, G.S. § 8C–1.

22. Criminal Law ⇐438(6, 7)

Photographs of homicide victim's body may be introduced into evidence to explain or illustrate testimony; moreover, photographs may be introduced even if they are gruesome, so long as they are used by witness to illustrate his testimony and so long as excessive number are not used solely to arouse passions of jury. Rules of Evid., Rule 403, G.S. § 8C–1.

23. Homicide ⇐358(1)

In capital sentencing proceeding, photographs of victim's face were admissible to illustrate testimony concerning body's appearance when it was found at crime scene and to explain testimony concerning decomposition of body as it related to length of time body was at crime scene and to medical examiner's failure to detect sperm in victim's body after defendant confessed that he and others had raped victim. Rules of Evid., Rule 403, G.S. § 8C–1.

24. Constitutional Law ⇐270(1)
Criminal Law ⇐1213.7

Jury's failure to find mitigating circumstances did not violate defendant's rights under Eighth and Fourteenth Amendments despite peremptory instruction at capital sentencing hearing that all evidence tended to show that defendant lacked capacity to appreciate criminality of his conduct or to conform to requirements of law; jury was not required to accept uncontradicted testimony of defendant's psychologist, in light of fact that she did not examine him until seven years after the killing. U.S.C.A. Const.Amends. 8, 14.

25. Criminal Law ⇐753.1

Peremptory instruction does not deprive jury of its right to reject evidence based on lack of faith in evidence's credibility.

26. Criminal Law ⇐577.10(8), 577.14

Thirty-two month delay between decision granting defendant new capital murder trial and date defendant filed written motion to dismiss for failure to afford him a speedy trial did not deprive defendant of right to speedy trial, where delay was occasioned in substantial part by numerous pending motions of defendant. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⇐577.1

Accused has right to speedy trial in criminal prosecution. U.S.C.A. Const. Amend. 6.

28. Criminal Law ⇐577.10(1)

In determining whether delay in trial violates Sixth Amendment, court must examine length of delay, reason for delay, defendant's assertion of speedy trial right, and prejudice resulting from delay. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⇐1177

Delay between decision granting new trial in capital murder prosecution and retrial did not prejudice defendant, even though court allowed prosecution to introduce portions of former testimony of witness who died before retrial, where court allowed defendant to impeach witness as effectively as if witness had survived to testify. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⇐636(1), 1166.14

Use of videotaped depositions which were taken without defendant's presence did not violate defendant's right to be present at all stages of his trial for capital murder and was harmless error, where testimony of witnesses tended to support mitigating circumstances and was in no way adverse to defendant's interests. Const. Art. 1, § 23.

31. Criminal Law ⇐1166.14

In determining whether violation of state constitutional requirement that defendant be present at every stage of his capital trial was harmless, court must determine whether state has borne burden of showing that error was harmless beyond reasonable doubt. Const. Art. 1. § 23.

32. Jury ⇐108, 131(4)

Defendant was not entitled to examine and attempt to rehabilitate jurors who had been successfully challenged for cause by state, where jurors had expressly acknowledged that their views on capital punishment would substantially impair their ability to impartially perform their duties; defendant made no showing that further questioning would likely have produced different answers.

33. Jury ⇐121

Upon determining that *Batson* violation had occurred, court was not required to seat improperly removed jurors and, instead, could begin selection process again with new panel; it was unlikely that jurors who had been discriminated against could have remained impartial. U.S.C.A. Const. Amend. 14; G.S. § 15A–1443(b).

34. Criminal Law ⇐1166.16

Even if failure to reinstate improperly removed jurors after determining that *Batson* violation had occurred was error, it was harmless, since only practicable remedy which could have been provided on appeal would have been new trial with new jury in any event. U.S.C.A. Const.Amend. 14; G.S. § 15A–1443(b).

35. Constitutional Law ⇐42.2(2)

Although prospective juror's right is independent of rights of criminal defendant on trial, defendant has standing to raise equal protection claim of prospective juror improperly excluded on basis of race. U.S.C.A. Const.Amend. 14.

36. Jury ⇐121

Upon determining that *Batson* violation has occurred, trial court may begin jury selection process anew with new panel of prospective jurors rather than seat jurors who have been improperly excluded. U.S.C.A. Const.Amend. 14.

37. Criminal Law ⇐517.2(2), 525

Confession was voluntary, despite contention that defendant's mental retardation and emotional disabilities prevented him from making knowing and intelligent waiver of his constitutional rights; defendant chose to go with officers to police station and appeared to have no problems understanding instructions, and while at police station, officers read each of defendant's constitutional rights to him and he indicated that he understood them and signed a waiver of rights form. U.S.C.A. Const. Amend. 5.

38. Criminal Law ⇐525

Mental retardation is a factor to be considered in determining voluntariness of confession, but this condition standing alone does not render otherwise voluntary confession inadmissible. U.S.C.A. Const. Amend. 5.

39. Criminal Law ⇐1134(3), 1158(4)

Trial court's findings of fact following voir dire hearing concerning admissibility of confession are conclusive and binding on appellate courts when they are supported by substantial competent evidence; conclusions of law from such findings, however, are fully reviewable on appeal but will be sustained if they are correct in light of the findings. U.S.C.A. Const.Amend. 5.

40. Criminal Law ⇐1168(2)

Admission of former testimony of witness who died before trial of defendant for

capital murder was harmless beyond reasonable doubt, even though defendant contended that admission of evidence violated his rights under confrontation clause because new evidence concerning witness' reputation for untruthfulness had surfaced since first trial; defendant impeached witness as effectively as if he had survived to testify and be cross-examined. U.S.C.A. Const.Amend. 6.

41. Criminal Law ⇐1134(3)

After determining that defendant's trial and capital sentencing proceeding are free from prejudicial error, reviewing court must ascertain whether record supports jury's findings of aggravating circumstances on which sentence of death was based, whether death sentence was entered under influence of passion, prejudice, or other arbitrary consideration, and whether death sentence is excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant. G.S. § 15A-2000(d)(2).

42. Criminal Law ⇐1134(3)

In conducting proportionality review of death sentence, reviewing court determines whether death sentence in case at hand is excessive or disproportionate to penalty imposed in similar cases considering crime and defendant. G.S. § 15A-2000(d)(2).

43. Criminal Law ⇐1208.1(4.1)
Homicide ⇐357(7, 12)

Death sentence imposed on mentally retarded defendant convicted of raping and helping to kill 11-year-old girl was not disproportionate; case was not particularly similar to any case in which court had found death penalty disproportionate or to cases in which the jury had recommended life sentences. G.S. § 15A-2000(d)(2).

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment and sentence of death upon the defendant's conviction of first-degree murder, entered by Thompson, J., in the Superior Court, Cumberland County, on 22 November 1991. Heard in the Supreme Court on 15 February 1993.

Michael F. Easley, Atty. Gen. by David Roy Blackwell, Sp. Deputy Atty. Gen., Raleigh, for the State.

Robert H. Tiller, Raleigh, for defendant-appellant.

MITCHELL, Justice.

The defendant was indicted by the Robeson County Grand Jury for the first-degree murder and the first-degree rape of Sabrina Buie and was tried during the 8 October 1984 Criminal Session of Superior Court, Robeson County. The jury returned verdicts finding him guilty of first-degree murder on both the theory of premeditation and deliberation and the theory of felony murder and of first-degree rape. At the conclusion of a separate capital sentencing proceeding, the jury recommended a sentence of death, and the trial court entered a sentence in accord with the recommendation. The trial court also entered judgment sentencing the defendant to imprisonment for life for first-degree rape. In an opinion filed on 3 February 1988, this Court granted the defendant a new trial for errors committed in the trial court and remanded this case to the Superior Court, Robeson County. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988).

After our remand, the defendant was indicted by the Robeson County Grand Jury in a superseding indictment for the first-degree murder of Sabrina Buie. Following an order changing venue to Cumberland County, the defendant was tried capitally at the 4 November 1991 Criminal Session of Superior Court, Cumberland County. The jury convicted the defendant of first-degree rape and of first-degree murder on the felony murder theory. At a separate capital sentencing proceeding, pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court entered a sentence of death upon the verdict finding the defendant guilty of first-degree murder. The trial court arrested judgment on the conviction of first-degree rape. The defendant appealed to this Court as a matter of right from the judgment sentencing him to death for first-degree murder.

The State's evidence introduced at trial tended to show, *inter alia*, the following. On Sunday, 25 September 1983 at approximately 12:20 a.m., Ronnie Lee Buie noticed that his eleven-year-old daughter, Sabrina Buie, was missing from their home in Robeson County when he returned home from working the midnight shift at a nearby business. On 26 September 1983, James Shaw, a friend of Ronnie Lee Buie, found Sabrina Buie's nude body in a soybean field.

An autopsy was performed upon the body of Sabrina Buie. Linear abrasions on her back and buttocks revealed a pattern indicating that the body had been dragged over a rough surface. There was a tear or laceration deep within the victim's vagina and a tear or laceration in her anal canal. Petechial hemorrhaging, characterized as the bursting of small blood vessels caused by pressure, was observed in the victim's eyes. Similar hemorrhaging caused by a pressure mechanism was also observed in the heart and lungs. The brain appeared slightly swollen due to a lack of oxygen.

A stick and pair of panties were wedged in the victim's throat, completely obstructing the airway. Dr. Deborah Radisch, Chief Assistant Medical Examiner for the State of North Carolina, testified that the victim died of asphyxiation.

The defendant, Henry Lee McCollum, gave a statement to law enforcement officers on 28 September 1983. In this statement, the defendant McCollum said that he saw Sabrina Buie and Darrell Suber come out of Suber's house at approximately 9:30 p.m. on 24 September 1983. McCollum, Chris Brown, Louis Moore and Leon Brown joined Sabrina Buie and Darrell Suber, and the group then went to a "little red house near the ballpark." The five males tried to convince Sabrina to have sexual intercourse with them, but she refused. Two of the males went to a store and purchased some beer. When they returned, the males discussed having sexual intercourse with Sabrina. Louis Moore refused to participate and left.

The four remaining males and Sabrina then walked across a soybean field and sat in some bushes where they drank beer. Suber stated that he was going to have sexual intercourse with Sabrina. At this point, the defendant McCollum grabbed Sabrina's right arm and Leon Brown grabbed her left arm. Eleven-year-old Sabrina then began to yell, "Mommy, Mommy" and "Please don't do it. Stop." Suber then raped Sabrina while the defendant and Brown held her arms. Subsequently, each man raped Sabrina while the others held her. Leon Brown then sodomized the child while Chris Brown held her.

After the men had raped and sodomized Sabrina, Suber said "we got to do something because she'll go uptown and tell the cops we raped her. We got to kill her to keep her from telling the cops on us." The defendant McCollum grabbed Sabrina's right arm while Leon Brown grabbed her left arm. Chris Brown knelt over Sabrina's head and pushed her panties down her throat with a stick while Leon Brown and the defendant held her down. After determining that the child was dead, the defendant and Chris Brown dragged her body away to a bean field to hide it from view.

Other evidence introduced at trial is discussed at other points in this opinion where pertinent to the issues raised by the defendant.

By his first assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by submitting to the jury the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The defendant argues that since the jury declined to convict him under a theory of premeditation and deliberation, the jury could not subsequently find that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The defendant also argues that since the only person expressing the intent to avoid arrest as a basis for the murder was Darrell Suber, not the defendant, there is no evidence that the defendant acted in an attempt to avoid a lawful arrest.

[1] N.C.G.S. § 15A-2000(e)(4) provides that the jury may consider as an aggravating circumstance justifying the imposition

of the death penalty the fact that the "capital felony was committed for the purpose of avoiding or preventing a lawful arrest...." N.C.G.S. § 15A-2000(e)(4) (1988). However, before the trial court may instruct the jury on this aggravating circumstance, there must be substantial competent evidence from which the jury can infer that at least one of the defendant's purposes for the killing was the defendant's desire to avoid subsequent detection and apprehension for his crime. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

[2] In the present case, evidence tended to show that after the defendant and the other males had raped Sabrina Buie, Darrell Suber said, "we got to kill her to keep her from telling the cops on us." In response to Suber's statement, the defendant and Leon Brown held the child's arms while Chris Brown forced her panties down her throat with a stick until she was dead. The defendant's actions following Suber's statement were evidence of his adoption of Suber's stated motive for killing Sabrina Buie. Therefore, evidence of the defendant's actions following Suber's statement was substantial competent evidence from which the jury could find that the defendant participated in the killing to avoid detection and apprehension for the felony of rape.

[3] The defendant also argues in support of this assignment of error that the jury "declined to convict him of murder with malice, premeditation and deliberation" and, in so doing, rejected the theory that he participated in the killing of the victim after premeditation and deliberation. The defendant contends that: "In so doing, the jury rejected the argument that Mr. McCollum 'intentionally killed the victim or that he intended that she be killed ... and that he acted with malice after premeditation and deliberation.'" The defendant argues that, as a result, the jury's verdict "shows that there was not sufficient evidence to find that Mr. McCollum acted with premeditation and deliberation. *A fortiori*, there was also not sufficient evidence to find that 'one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for the crime.'" The defendant reasons that, having failed to find that the defendant "acted intentionally and with premeditation in the guilt phase, the jury could not then reasonably find that he acted intentionally and with premeditation in the sentencing phase." Therefore, the defendant argues that the trial court erred by permitting the jury to consider finding the aggravating circumstance that the defendant participated in the killing to avoid arrest. We do not agree.

The pertinent portions of the verdict form submitted to the jury in connection with the first-degree murder charge and the answers the jury recorded thereon were as follows:

> We, the jury return the unanimous verdict as follows:
>
> 1. GUILTY of FIRST DEGREE MURDER
>
> Answer: yes
>
> IF YOU ANSWER "YES," IS IT:
>
> A. On the basis of malice, premeditation and deliberation?
>
> ANSWER: ____
>
> B. Under the first-degree felony murder rule?
>
> ANSWER: yes

Contrary to the trial court's instructions and the requirements of the verdict sheet itself, the jury failed to give either a "yes" or "no" answer with regard to whether it found the defendant guilty of first-degree murder on the basis of premeditation and deliberation. Instead, the jury stated that it had found the defendant guilty of first-degree murder under the felony murder rule without giving any indication as to whether it had reached or decided the question of whether the defendant participated in the killing with malice and after premeditation and deliberation.

[4] This Court has taken the position that: "Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989) (citations omitted). Therefore, the defendant here was convicted of first-degree murder and has not been acquitted of anything. *See id.*

More to the point, we cannot know from the jury's failure to follow the trial court's instructions to give a "yes" or "no" answer to the question relating to premeditation and deliberation what, if any, consideration the jury gave to this issue or what, if any, decision it reached. To conclude, as the defendant would have us conclude, that the jury rejected the theory that the defendant acted with premeditation and deliberation would require us to engage in sheer speculation unsubstantiated by anything in the record before us. This we may not do. Accordingly, we conclude that this assignment of error is without merit.

[5] By another assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) provides that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). The defendant does not contend that the murder of the eleven-year-old victim by the men who had just raped and sodomized her was not especially heinous, atrocious or cruel. Instead, he contends that the trial court erred by instructing the jury that it could find this aggravating factor if "this murder" was especially heinous, atrocious or cruel, because the trial court's "instruction" failed to require the jury to find this aggravating circumstance only if it was supported by the defendant's own conduct.

As authority for his argument, the defendant relies upon *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In *Enmund*, the Court held that capital punishment must be tailored to the particular defendant's personal responsibility and moral guilt. *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. However, the defendant's reliance on *Enmund* is misplaced. *Enmund* involved the propriety of a death sentence, based upon a felony murder conviction, imposed upon a defendant who did not commit the homicide, was not physically present when the killing took place, and did not intend that a killing take place or that lethal force be employed.

In the present case, entirely unlike the situation in *Enmund*, all of the evidence at trial tended to show that the defendant was physically present when the killing took place and was an active participant in Sabrina Buie's murder. The defendant's statement to law enforcement officers shows that he raped Sabrina Buie and then held her arms so that Chris Brown could carry out the expressly stated intent to kill the child. In light of the uncontroverted evidence of the defendant's active participation in Sabrina Buie's murder, coupled with the brutal nature of the crime, the manner in which the trial court submitted the aggravating circumstance was not error. This assignment of error is without merit.

[6] By another assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by instructing the jury that the imposition of the death penalty would be proper if the State proved beyond a reasonable doubt that the defendant "was a major participant in the underlying felony and exhibited reckless indifference to human life."

In *Enmund* the Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. In a later case, however, the Court further construed its holding in *Enmund* and held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient grounds for the imposition of the

death penalty. *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127, 145 (1987).

In the instant case, the trial court instructed the jury that before it could recommend that the defendant be sentenced to death, the State must, *inter alia*, prove beyond a reasonable doubt that "the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life." This instruction comports with *Enmund* and *Tison*, as well as with the North Carolina Pattern Instructions. *See* N.C.P.I.—Crim. 150.10 (1988). Accordingly, this assignment of error is without merit.

[7] By another assignment of error, the defendant contends that the trial court erred in permitting the prosecutor to make several prejudicial statements during closing arguments in the capital sentencing proceeding. The defendant contends that the prosecutor's closing argument contained statements which tended to inflame the jury, misstate the applicable law, or had no evidentiary basis in the record.

[8, 9] As a general proposition, counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). In order for a defendant to receive a new sentencing proceeding, the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157-(1986). In the present case, the defendant argues that several portions of the prosecutor's closing argument were prejudicial. We will address each of the defendant's contentions individually.

On several occasions, the prosecutor asked the jurors to imagine that the victim was their child. Specifically, the prosecutor asked the jurors the following questions: "How many of you would want you child to be drug across a wooded field, wooded area, to have the skin scraped of her young back like that after these defer dants had raped her and abused her body. "The photographs that you've seen durin the course of this trial, the photograph showing Sabrina bleeding from her nose from her mouth, how many of you woul like to have to see your child looking lik that?" "How many of you would wan your child to end up in a morgue lookin like that and have to have her body spli open to determine how she died?" The trial court overruled the defendant's objections to these arguments. However, the trial court subsequently sustained the defendant's objections to substantially similar arguments.

[10] An argument "asking the jurors to put themselves in place of the victims will not be condoned...." *United States v. Picknarcik*, 427 F.2d 1290, 1291 (9th Cir. 1970). In the present case, the prosecutor repeatedly asked the jury to imagine the victim as their own child. We assume *arguendo* that these arguments were improper. At issue in this case, therefore, is whether these portions of the prosecutor's closing argument denied the defendant due process. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

The prosecutor's arguments here did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent. The trial court instructed the jurors that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. Moreover, the weight of the evidence against the defendant with respect to the two aggravating circumstances submitted to the jury was heavy the defendant's own statement to police officers established that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious or cruel. All of these factors reduced the likelihood that the jury's decision was influenced by these

portions of the prosecutor's closing argument. Therefore, the prosecutor's closing argument did not deny the defendant due process. *Id.*

[11, 12] The defendant next argues that the trial court should have excluded the prosecutor's comments regarding the impact of Sabrina's death on her father and the fact that he wanted revenge. The defendant contends that these statements sought to inflame the jury. However, there were no objections made to these portions of the prosecutor's argument during the capital sentencing proceeding. If a party fails to object to a closing argument, we must decide whether the argument was so improper as to warrant the trial judge's intervention *ex mero motu*. *State v. Craig*, 308 N.C. 446, 457, 302 S.E.2d 740, 747, *cert. denied*, 464 U.S. 908, 104 S.Ct. 263, 78 L.Ed.2d 247 (1983). The standard of review is one of "gross impropriety." *Id.* In *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980), this Court held that the prosecutor's remarks during closing concerning what the victim must have been thinking as he was dying and what the family of the victim experienced following the loss were not grossly improper. Similarly, we conclude that the prosecutor's remarks regarding the impact of Sabrina's death on her father and the fact that he wanted revenge were not so grossly improper as to require the trial court to intervene *ex mero motu*.

[13, 14] The defendant next argues in support of this assignment that the prosecutor made several misstatements of law during closing arguments in the capital sentencing proceeding. It is well settled that the trial court is required to censor remarks not warranted either by the law or by the facts. *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977). First, the defendant argues that the prosecutor's comments tended to diminish the jury's responsibility during the sentencing phase of this capital case in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell* the Court held that it is unconstitutional to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Id.* at 328, 105 S.Ct. at 2639, 86 L.Ed.2d at 239. In the present case, the prosecutor told the jury that "you aren't the ones that are imposing the punishment yourself. It's your recommendation that's binding on the Court, but it is a fair recommendation if you recommend the death penalty in this case." The prosecutor's statement that the jury's recommendation is binding on the Court is consistent with N.C.G.S. § 15A-2000(b), which provides that "[a]fter hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court...." N.C.G.S. § 15A-2000(b) (1988). Moreover, the prosecutor's statement informed the jury that its recommendation would be binding on the trial court and did not suggest to the jurors that they could depend upon judicial or executive review to correct any errors in their verdict. The prosecutor did not misstate the law in this portion of the closing argument.

[15, 16] The defendant next argues that the prosecutor improperly suggested to the jury during the capital sentencing proceeding that its decision should be made with reference, not just to the evidence, but also to the desires of their community. The prosecutor stated, "and if you let this man have his life, you will be doing yourself, your community a disservice." It is well settled that the prosecutors's remarks reminding the jury that, for purposes of the defendant's trial, it was acting as the voice and conscience of the community are permissible. *Soyars*, 332 N.C. at 61, 418 S.E.2d at 488; *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985). In addition, the trial court in this case immediately sustained the defendant's objection to the prosecutor's statement. Therefore, any possible error was cured.

[17] The defendant next argues that the prosecutor improperly argued to the jury during the capital sentencing proceeding that it should weigh each individual mitigating circumstance against all of the

aggravating circumstances in a "divide and conquer" approach. For example, in arguing that the jury should give little weight to the defendant's mental disabilities, the prosecutor stated that "the aggravating circumstances substantially outweigh that factor." The defendant did not object to the prosecutor's statements. Therefore, we must determine whether the trial court was required to intervene *ex mero motu*. *See State v. Craig*, 308 N.C. 446, 302 S.E.2d 740 (1983). We conclude that there was no such gross impropriety here.

[18] The defendant next argues that during the capital sentencing proceeding the prosecutor improperly attempted to alert the jury to the fact that the defendant had been tried on a previous occasion. In an attempt to discredit Dr. Faye Sultan, the defendant's expert psychologist, the prosecutor asked the jury to consider why the expert had waited seven years to examine the defendant. The defendant notes that the prosecutor did not ask this question during cross examination.

[19] Counsel is permitted to argue from the evidence which has been presented, as well as reasonable inferences that can be drawn therefrom. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. Dr. Sultan testified regarding the dates of her meetings with the defendant and the length of his imprisonment. In addition, both parties had acknowledged that the murder occurred in September 1983. Consequently, it was permissible for the prosecutor to challenge the accuracy of Dr. Sultan's conclusions in light of the passage of seven years between the commission of the crime and her first examination of the defendant.

[20] The defendant next contends that the prosecutor improperly expressed his personal opinions during closing arguments in the sentencing proceeding. The defendant argues that the following statements were improper: First, the prosecutor stated, "if the aggravating circumstances don't outweigh the mitigating circumstances that you may find, then there will never be a case where they do." Second, the prosecutor told you that this is probably the most cruel, atrocious and heinous crime you'll ever come in contact with." The defendant did not object at trial to these statements. Therefore, the gross impropriety standard applies. The prosecutor's comments in this case were proper in light of his role as a zealous advocate for convictions in criminal cases. *See Scott*, 314 N.C. at 311, 333 S.E.2d at 297. The prosecutor was not stating his personal opinion, but merely arguing that the jury should conclude from the evidence before it that the imposition of the death penalty was proper in this case. For the foregoing reasons, we conclude that the arguments of the prosecutor during the capital sentencing proceeding in this case, which are the subject of this assignment of error, did not amount to prejudicial error. Accordingly, this assignment of error is overruled.

[21] By another assignment of error, the defendant contends that the trial court erred by admitting photographs of the victim's body into evidence. For the limited purpose of illustrating the testimony of the medical examiner and Agent Leroy Allen, the trial court admitted three photographs of the victim's body into evidence. The defendant contends that admission of these photographs was error because their probative value was substantially outweighed by their unfair tendency to inflame the jury. N.C.G.S. § 8C-1, Rule 403 (1988).

[22] Photographs of a homicide victim's body may be introduced into evidence to explain or illustrate testimony. *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). Moreover, photographs may be introduced into evidence even if they are gruesome, so long as they are used by a witness to illustrate his testimony and an excessive number are not used solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988).

In the present case, the medical examiner, Dr. Deborah Radisch, utilized a photograph showing the victim's neck and throat

stick and a pair of panties had been found lodged in the victim's throat and Dr. Radisch determined that the cause of death was asphyxiation. State Bureau of Investigation Agent Leroy Allen utilized the photograph to illustrate and explain his collection and retrieval of the physical evidence, specifically the panties from the victim's windpipe. This photograph was properly admitted for the limited purpose of illustrating the witness's testimony.

[23] The defendant also contends that photographs of the victim's face, at both the crime scene and at the time of the autopsy, depicting the decomposition process, were introduced for the sole purpose of inflaming the jury. On the contrary, Agent Allen utilized the crime scene photograph to illustrate his testimony concerning the body's appearance when it was found at the crime scene. Similarly, Dr. Radisch utilized the photograph taken at the autopsy to illustrate her testimony regarding the autopsy. Specifically, the presence of decomposition bears directly upon the length of time the body lay in the field and further explained Dr. Radisch's testimony concerning her failure to detect any sperm in the victim's body. Since the photographs were not excessive in number and were used for the purpose of illustrating the testimony of Dr. Radisch and Agent Allen, the trial court did not err in admitting the photographs into evidence. This assignment is without merit.

[24] By another assignment of error, the defendant contends that the jury's failure to find clearly proven mitigating circumstances violated his rights under the Eighth and Fourteenth Amendments. The trial court instructed the jury that

> All of the evidence tends to show that the capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements of law was impaired.
>
> Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.
>
> However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Despite the trial court's peremptory instruction, the jury failed to find the mitigating circumstance.

[25] It is well settled that a peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). In the present case, the defendant relied upon the testimony of Dr. Faye Sultan to support the submission of the mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time the victim was killed. Contrary to the defendant's contention, the jury was not required to accept Dr. Sultan's testimony. *See id.* Even though Dr. Sultan's testimony was uncontradicted, we cannot say, in light of the fact that she did not examine the defendant until seven years after the killing, that her testimony was manifestly credible. Accordingly, this assignment of error is without merit.

[26] By another assignment of error, the defendant contends that his Sixth Amendment right to a speedy trial was violated. The defendant was originally tried during the 8 October 1984 Criminal Session of Superior Court for Robeson County and sentenced to death on 25 October 1984. In an opinion filed on 3 February 1988, this Court granted the defendant a new trial and remanded this case to the Superior Court, Robeson County. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988). A superseding indictment for murder was returned against the defendant by the Robeson County Grand Jury on 7 January 1991. Thereafter, venue for trial was transferred from Robeson County to Cumberland County.

Although the record on appeal is less than complete, the defendant's motion for speedy trial included in the Record on Appeal in this case contains a statement by counsel for the defendant that he was informed in August of 1990 that the State intended to bring this case to trial (apparently in Robeson County) during the week of 8 October 1990. Subsequently, counsel for the defendant informally requested that the trial date be set later in October or in November. The motion for speedy trial asserts that as a result of a later conference telephone call between the court and counsel for the defendant and for the State, counsel for the defendant suggested a 26 November 1990 trial date "as an accommodation for the defendant," which "was agreed to by the Court and counsel for the state." The record on appeal is silent as to when, why or how the trial date was moved to the time the case was actually tried in November of 1991. However, it is clear that the case was tried at that time upon the superseding indictment for murder returned by the grand jury in January of 1991.

The Record on Appeal includes an order entered in the Superior Court, Robeson County, on 31 July 1991 which states that as of the date of that order "the defendant's motions to dismiss because of racial discrimination in the Grand Jury make-up and for change of venue are presently pending motions for which the court has not ruled upon, along with other pending motions." The order of 31 July 1991 also recites that "the defendant's trial was scheduled to begin on November 26, 1990, 1,027 days from the decision rendered on the defendant's appeal, but the case has been postponed further by motion and consent of defendant through his attorneys." The Superior Court went on to conclude in the 31 July 1991 order:

> That even though the delay of defendant's trial has been a long delay, it has not been an inordinate delay based on the seriousness of the charges and the complexities of the issues to be resolved concerning motions and rulings on those motions and other rulings of law.
>
> That there has been reasonable justification for failure to bring the defendant to trial sooner in that the former prosecutor of the case, The Honorable Joe Freeman Britt, is now a North Carolina Superior Court Judge and a new prosecutor, Assistant District Attorney John Carter, has been assigned to prosecute the charges against the defendant.
>
> That there appears to have been no prejudice to the defendant, Henry Lee McCollum, because of the delay of the trial.

Based upon its conclusions, the Superior Court denied the defendant's motion that the case against him be dismissed for failure to afford him a speedy trial.

From the record before us, it appears, although it is by no means certain, that the trial of this case was first scheduled for retrial during the week of 8 October 1990. The record indicates that any continuances of the date for trial to dates after that time were at the request of or with the acquiescence and consent of the defendant.

[27, 28] The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. In determining whether a delay in a trial violates the Sixth Amendment, this Court must examine the following interrelated factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

From the Record on Appeal in the present case, it appears that the defendant made no attempt to assert his right to a speedy trial during the 32-month interval between 3 February 1988, the date on which this Court entered its decision granting him a new trial, and September 1990, when the defendant filed his written motion to dismiss for failure to afford him a speedy trial. Delays in trying the case thereafter were at the request of the defendant or with his consent. The delay between our decision awarding the defendant a new trial and the initial date selected by the State for the defendant's retrial in this case was substantial. However, given the reasons for the delay found to have existed by the trial court, we conclude that the delay was not unreasonable or unjust and did not deny the defendant the right to a speedy trial guaranteed by the Sixth Amendment.

The order of the trial court denying the defendant's motion to dismiss for lack of a speedy trial makes it clear that the delays in retrying the defendant were occasioned in substantial part by reason of numerous motions *of the defendant* which were still pending. One of these motions, the motion for change of venue, was subsequently decided in the defendant's favor and venue was moved to Cumberland County. In addition, the motion to dismiss the action due to racial prejudice in the selection of the Grand Jury which initially indicted the defendant was apparently deemed by the State to have some merit since the State later obtained a superseding indictment returned by a different Grand Jury. Therefore, we do not believe that either the length of delay or the reasons for the delay argue strongly in favor of a conclusion that the defendant was denied his right to a speedy trial as guaranteed by the Sixth Amendment.

[29] With respect to prejudice resulting from the delay, the defendant contends that he has been prejudiced because he was not allowed to impeach one of the State's witnesses, L.P. Sinclair. Sinclair, who had lied before the defendant's retrial, had given testimony during the defendant's first trial to the effect that Sinclair had overheard the defendant and others planning to rape Sabrina and that the defendant later described the murder of the child to Sinclair. The trial court allowed the prosecution to introduce portions of Sinclair's former testimony. We conclude, however, that the defendant did not suffer any prejudice because the trial court admitted into evidence Sinclair's record of criminal convictions amassed since the defendant's first trial. Further, District Court Judge Stanley Carmical testified during the new trial of this case that, as an attorney, he had represented Sinclair in April 1989 and that in his opinion Sinclair "was not a truthful person." Further, the defendant had full opportunity and motive to cross-examine Sinclair at the first trial. The defendant impeached Sinclair as effectively as if Sinclair had survived to testify. We conclude that the defendant has not suffered any prejudice by reason of pretrial delay. This assignment of error is without merit.

[30] By another assignment of error, the defendant contends that his right under the Constitution of North Carolina to be present at all stages of his capital trial was violated by the admission into evidence of video-taped depositions taken outside his presence. In these depositions, counsel for both sides questioned the defendant's relatives and former teachers regarding his upbringing and character. These depositions were taken in New Jersey while the defendant was imprisoned in North Carolina.

[31] The Confrontation Clause of the Constitution of North Carolina, article I, section 23, guarantees the defendant's presence at every stage of his capital trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated on other grounds*, 497 U.S. 1021, 110 S.Ct. 3266, 111 L.Ed.2d 777 (1990). In the present case, the *defendant* introduced the depositions in support of mitigating circumstances during the capital sentencing proceeding. Nevertheless, the defendant now contends that the admission of the depositions which were taken without his presence violated his right to be present at every stage of his capital trial. This Court has previously held that the "induced error" or "invited error" doctrine, now codified as N.C.G.S. § 15A-1443(c), does not apply to the non-waivable right of a defendant to be present at every stage of his capital trial as guaranteed by the Constitution of North Carolina. *Huff*, 325 N.C. at 34, 381 S.E.2d at 654. Therefore, we turn to the issue of whether any error in the admission of the depositions in question was harmless error. In determining whether a violation of the state constitutional requirement that the defendant be

present at every stage of his capital trial was harmless, we must determine whether the State has borne the burden of showing that the error was harmless beyond a reasonable doubt. *Id.* at 34–35, 381 S.E.2d at 654.

For purposes of our consideration of the defendant's argument that his right under the Constitution of North Carolina to be present at every stage of his capital trial was violated, we assume *arguendo* that the taking of the depositions in New Jersey in the absence of the defendant amounted to a "stage" of his capital trial. However, it is clear that all of the testimony of the witnesses during the taking of those depositions tended to support mitigating circumstances. The admission of those depositions into evidence was favorable to the defendant and in no way adverse to his interests. Therefore, we conclude that any error involved in the admission of the depositions into evidence during the capital sentencing proceeding in the present case could not possibly have harmed the defendant. Accordingly, we conclude that the State has borne its burden of showing that any error here was harmless beyond a reasonable doubt. Accordingly, this assignment of error is without merit.

[32] By another assignment of error, the defendant contends that the trial court erred in refusing to allow him to examine and attempt to rehabilitate jurors who had been successfully challenged for cause by the State. *See Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (plurality opinion). We do not agree.

> This Court has consistently held that:
>
> [w]hen challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged [about the same matter].

State v. Cummings, 326 N.C. 298, 307, 389

ver, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981)). We conclude that the plurality decision in *Gray* does not invalidate this statement of the law.

Under this assignment of error, the defendant specifically complains of the trial court's action in excusing prospective jurors Barbour and Godbolt for cause. Before she was excused for cause, Barbour stated, in response to a question by the prosecutor, that she could not vote for a death sentence. After further questioning by the prosecutor and the trial court, she made it clear that, although she did not want to violate the law concerning the imposition of a death sentence, this was still her feeling. Additionally, she expressly acknowledged that her views on capital punishment would substantially impair her ability to perform her duties as a juror. Nothing in the record suggests that any further proper questioning would have altered her responses.

Prospective juror Godbolt also acknowledged strong personal feelings about the death penalty that would probably affect her impartiality. Upon questioning by the trial court, she reiterated that position. Nothing in the record suggests that further proper questioning would have caused her to alter her beliefs.

The defendant having made no showing that further questioning by him would likely have produced different answers, the trial court did not abuse its discretion by excusing the prospective jurors in question, who had expressed unequivocal opposition to the death penalty, without allowing the defendant to propound further questions in an attempt to rehabilitate them. *See id.* This assignment of error is without merit.

[33, 34] By another assignment of error, the defendant contends that the trial court erred in refusing to seat jurors who previously had been excused as a result of improper peremptory challenges by the State. During jury selection, the State exercised three consecutive peremptory challenges to remove black prospective jurors. The defendant objected on the ground that

tablished a prima facie case of racial discrimination in the jury selection in violation of principles discussed in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court agreed. The prosecutor attempted to articulate a nondiscriminatory basis for his peremptory challenges, but the trial court was unpersuaded and concluded that a *Batson* violation had occurred. The trial court then inquired as to how the defendant and the State desired to proceed to correct the *Batson* violation. At this point, the defendant requested that the three black jurors the State had removed by peremptory challenges be seated. However, the trial court declined to seat these jurors and ordered that the jury selection process begin again with a new panel of forty prospective jurors.

[35] In *Batson* the Supreme Court of the United States held that the Equal Protection Clause forbids a prosecutor to peremptorily challenge potential jurors on account of their race. *Id.* at 96, 106 S.Ct. at 1722, 90 L.Ed.2d at 88. However, the *Batson* court stated that

> we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.

Id. at 100 n. 24, 106 S.Ct. at 1725 n. 24, 90 L.Ed.2d at 90 n. 24. Since its holding in *Batson*, however, the Supreme Court has held that a prospective juror has a right under the Equal Protection Clause of the Fourteenth Amendment not to be excluded from jury service on account of race. *Powers v. Ohio*, 499 U.S. 400, ——, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411, 424 (1991). Although the prospective juror's right is independent of the rights of the criminal defendant on trial, the defendant has standing to raise the equal protection claim of a prospective juror improperly excluded on the basis of race. *Id.*

[36] We believe that the better practice is that followed by the trial court in this case, and that neither *Batson* nor *Powers* requires a different procedure. We recognize and endorse the equal protection right of prospective jurors explained in detail in *Powers*. However, we conclude that the primary focus in a criminal case—particularly a capital case such as this—must continue to be upon the goal of achieving a trial which is fair to both the defendant and the State. To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully. As *Batson* violations will always occur at an early stage in the trial before any evidence has been introduced, the simpler, and we think clearly fairer, approach is to begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation.

Assuming *arguendo* that the trial court erred in failing to reinstate the prospective jurors previously excused and seat them on the jury in the defendant's case, however, we conclude that the error was harmless beyond a reasonable doubt and, therefore, not prejudicial *to this defendant*. N.C.G.S. § 15A-1443(b) (1988). If we held that the trial court's failure to reinstate the improperly removed jurors constituted error, the only practicable remedy we could provide at this point would be a new trial with a new jury selected on a nondiscriminatory basis. In the present case, after finding that there was *Batson* error, the trial court ordered that a new jury be selected on a nondiscriminatory basis. Therefore, the trial court's order provided the defendant with exactly the same remedy which the defendant now contends he should receive—trial by a jury selected on a nondiscriminatory basis. Consequently, the defendant has not suffered any prejudice by

the action of the trial court which gave him the same remedy he now seeks. This assignment of error is overruled.

[37] By another assignment of error, the defendant contends that the trial court erred in failing to exclude from evidence the defendant's statements made to police officers because they were obtained in violation of his constitutional rights. Specifically, the defendant contends that his mental retardation and emotional disabilities prohibited him from making a knowing and intelligent waiver of his constitutional rights.

Based upon evidence introduced during the *voir dire* hearing on the admissibility of the defendant's statements, the trial court made findings and concluded that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made the statements in question. The trial court found from substantial evidence introduced during the *voir dire* that the officers told the defendant that he could accompany them to the police station if he wished to do so. He chose to go with them and he appeared to have no problems understanding what the officers talked about or any instructions given by the officers. While at the police station, the officers read each of the defendant's constitutional rights to him, and he indicated that he understood them and then signed a waiver of rights form. During the interview, all of the defendant's answers were reasonable in relation to the questions asked by the officers.

[38, 39] It is well established that mental retardation is a factor to be considered in determining the voluntariness of a confession, but this condition standing alone does not render an otherwise voluntary confession inadmissible. *E.g., State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975). We have also repeatedly held that the trial court's findings of fact following a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts when, as here, they are supported by substantial competent evidence. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). The conclusions of law made by the trial court from such findings, however, are fully reviewable on appeal. *Id.* Those conclusions of law will be sustained on appeal if they are correct in light of the findings. *Id.*

In the present case, the trial court's findings were amply supported by substantial evidence presented on *voir dire*. Furthermore, the trial court's conclusion that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made his statements to the officers was a correct conclusion of law in light of the findings. Therefore, we conclude that the trial court did not err in this regard. This assignment of error is without merit.

[40] By another assignment of error, the defendant contends that the trial court violated his Sixth Amendment confrontation right in failing to exclude the former testimony of State's witness L.P. Sinclair. Sinclair testified during the first trial of this case, in which the defendant was convicted and sentenced to death. However, Sinclair died prior to the new trial which is the basis of the defendant's current appeal to this Court. The defendant contends that he did not have an adequate opportunity to cross-examine Sinclair during the new trial of this case because new evidence concerning Sinclair's reputation for untruthfulness had surfaced since the first trial.

Assuming *arguendo* that the trial court erred in failing to exclude Sinclair's former testimony, this error was harmless beyond a reasonable doubt. We have pointed out previously in this opinion, the defendant tendered and the trial court admitted into evidence Sinclair's record of convictions amassed since the first trial. Further, District Court Judge Stanley Carmical testified during the new trial of this case that, as an attorney, he had represented Sinclair in April 1989 and that in his opinion Sinclair "was not a truthful person." The defendant has not pointed to any additional information not available to him in the first trial of this case which would have tended to impeach Sinclair as a witness or otherwise would have been of assistance to the defendant had Sinclair been present and subject to cross-examination during the defendant's new trial. We conclude, therefore, that the defendant impeached Sinclair as effectively as if he had survived to testify and be cross-examined. Given the defendant's opportunity to cross-examine Sinclair at the time Sinclair testified during the first trial of this case, and in light of the fact that the defendant was permitted to offer the foregoing evidence in the new trial tending to impeach Sinclair's credibility, we conclude that the defendant was not denied his Sixth Amendment right to confront this witness. This assignment of error is without merit.

We have addressed the foregoing assignments of error in the order they were presented in the defendant's brief before this Court in this appeal. The defendant has also brought forward on this appeal other assignments of error which he correctly acknowledges have previously been decided by this Court contrary to his position, but which he nonetheless brings forward in order to preserve them for further appellate review. We acknowledge that those assignments are properly preserved, but as we have previously found them to be without merit we do not address them here.

[41] Having concluded that the defendant's trial and capital sentencing proceeding were free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. *See State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354-55, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177 (1983). It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based, (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration, and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

We have thoroughly examined the record, transcripts, and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

[42] We turn now to our final statutory duty of proportionality review. In conducting proportionality review, "we determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *Id.*

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985).

[43] In the present case, the defendant was convicted of first-degree murder (upon the theory of felony murder) and of first-degree rape. The jury found as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. Further, the trial court having given the jury instructions properly limiting and defining the "especially heinous, atrocious or cruel" aggravating circumstance in accord with *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (1981), the jury found that the murder was especially heinous, atrocious or cruel. The jury found the following mitigating circumstances: (1) The defendant has no significant history of prior criminal activity; (2) The capital felony was committed while the defendant was under the influence of a mental or emotional disturbance; (3) The defendant is mentally retarded; (4) The defendant is easily influenced by others; (5) The defendant has difficulty thinking clearly when under stress; (6) Shortly after arrest, and at an early stage of the

criminal process; the defendant voluntarily cooperated with the police by making a confession; and (7) The defendant has adapted to the disciplined environment of prison, and has committed no infractions during the period from 1983 to 1991.

In our proportionality review, we must compare the present case with other cases in which this Court has ruled upon the proportionality issue. This case is not particularly similar to any case in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases is distinguishable from the present case.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the evidence tended to show that the defendant hid in the bushes at a bank for about two hours waiting for the victim to make his nightly deposit. When the victim arrived at the bank, the defendant demanded the money bag. The victim hesitated, so the defendant fired a shotgun, striking him in the upper portion of both legs. The victim later died of cardiac arrest caused by the loss of blood from the shotgun wounds. The jury found only one aggravating circumstance, murder for pecuniary gain. The defendant also pleaded guilty during the trial and acknowledged his wrongdoing before the jury. *Benson* is easily distinguishable from the present case. In *Benson*, unlike in the present case, some evidence tended to show that the defendant did not intend to kill the victim because he shot him in the legs rather than a more vital part of his body. In addition, the jury here found two aggravating circumstances.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant and several others planned to rob the victim's place of business. During the robbery, one of the assailants severely beat the victim, killing him. *Stokes* is also easily distinguishable from the present case, because Stokes' codefendant, whom the majority of this Court seemed to believe equally culpable with Stokes, was sentenced to life imprisonment. In addition, the jury in *Stokes* found only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, while the jury here found that aggravating circumstance plus one additional aggravating circumstance.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the only aggravating circumstance found by the jury was that the murder for which Rogers was convicted was part of a course of conduct which included the commission of violence against another person or persons. In the present case, the jury found two aggravating circumstances—the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious, or cruel.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant and two companions went to the victim's home intending to rob and murder him. After gaining entry into the victim's home, the men killed the victim and stole his money. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. In concluding that the death penalty was disproportionate, this Court distinguished that case from cases where the death sentence had been upheld. We focused on the failure of the jury in *Young* to find either the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, or the aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons. The present case is easily distinguishable from *Young* because, among other things, the jury found that the murder in this case was especially heinous, atrocious, or cruel.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the single aggravating circumstance found by the jury was that the murder was committed against a law enforcement officer engaged in the performance of his official duties. In the present case, the jury found two entirely different aggravating circumstances. *Hill* is easily distinguishable from this case in which the

defendant and others "gang" raped and strangled an eleven-year-old child to death.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was on foot and waved down the victim as the victim passed in his truck. Shortly thereafter, the victim's body was discovered in his truck. He had been shot twice in the head and his wallet was gone. The single aggravating circumstance found was that the murder was committed for pecuniary gain. In contrast, the jury here found that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious, or cruel.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the evidence tended to show that the defendant and a group of friends were riding in a car when the defendant taunted the victim by telling him that he would shoot him and questioning whether the victim believed that the defendant would shoot him. The defendant shot the victim, but then immediately directed the driver to proceed to the emergency room of the local hospital. In concluding that the death penalty was disproportionate there, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the jury in the present case found that the defendant and his friends killed the victim to prevent her from telling the police that they had raped her.

For the foregoing reasons, we conclude that each of the cases in which we have found the death penalty to be disproportionate is distinguishable from the present case. The present case bears little similarity to any of those cases.

In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.

The defendant relies on four cases in which the jury recommended life sentences: *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991); *State v. Harris*, 319 N.C. 383, 354 S.E.2d 222 (1987); and *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983). We find each of those cases distinguishable from the present case.

In *Fincher*, the jury found the defendant guilty of first-degree murder on the theory of felony murder, premised upon the felony of rape. The jury, however, recommended a sentence of life imprisonment. At trial, the defendant presented psychiatric testimony which tended to show that he was mentally retarded and suffered from a schizophreniform disorder. Moreover, the defendant's mental illness caused a disturbance of his mood and behavior, sometimes to the extent that the defendant suffered from auditory hallucinations. The defendant in the present case does not suffer from a schizophreniform disorder. Further, unlike Fincher, who acted alone, the defendant in the present case acted with the assistance of three other males in raping and sodomizing the child victim and then assisted in killing her and hiding her body in order to avoid detection and arrest.

In *McKinnon*, the defendant was convicted of first-degree murder on the theory that the killing was committed during the course of second-degree rape and second-degree sex offense. The jury recommended a sentence of life imprisonment. Unlike McKinnon, the defendant in the present case acted with others in "gang" raping and killing an eleven-year-old child. In addition, the underlying felony supporting the defendant's conviction on the felony murder theory was first-degree rape and not second-degree rape as was the case in *McKinnon*.

In *Harris*, the defendant was found guilty of first-degree murder, premised upon the felony of attempted rape. The

jury recommended life imprisonment. The evidence tended to show that the victim died as a result of multiple stab wounds. Unlike the defendant in *Harris* who attempted to rape the victim prior to killing her, the defendant in the present case and his friends "gang" raped and sodomized a child and then, acting together, strangled her so that she could not tell the police.

In *Franklin*, the defendant was found guilty of first-degree murder under the felony murder theory, premised upon first-degree sexual offense. The jury recommended a sentence of life imprisonment. According to the defendant's statement to law enforcement officers, he stabbed the victim several times after forcing her to perform oral sex. In contrast, the defendant in the present case and his friends "gang" raped and sodomized a child and then, acting together to avoid detection, strangled her by shoving her panties on a stick down her throat.

For the foregoing reasons, we conclude that each of the cases relied upon by the defendant in which the jury recommended life imprisonment is distinguishable from the present case. The present case is not strikingly similar to any of those cases.

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we have previously stated, and we reemphasize here, that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177 (1983). Here, it suffices to say we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate. *E.g.*, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 108 S.Ct. 359, 98 L.Ed.2d 384 (1987) (death sentence upheld where defendant stabbed and killed a seven-year-old girl during the commission of the felony of first-degree rape); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed.2d 173 (1983) (first-degree felony murder conviction and death sentence upheld even though the jury found that the defendant was under the influence of mental or emotional disturbance when he committed the murder and that the defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of law was impaired).

All of the evidence presented in the present case was to the effect that the defendant and three other males "gang" raped and sodomized eleven-year-old Sabrina Buie while she begged them not to and called out for her "Mommy." The defendant then helped to hold Sabrina's arms while one of the other men took a stick, with Sabrina's panties attached to the end of it, and shoved it down her throat until she stopped breathing. The men next dragged Sabrina's body away from the crime scene and hid it in a field. After comparing this case carefully with all others in the pool of "similar cases" used for proportionality review, we conclude that it falls within the class of first-degree murders for which we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of the defendant's assigned errors, we hold that the defendant's trial and capital sentencing proceeding were free of prejudicial error. Therefore, the sentence of death entered against the defendant must be and is left undisturbed.

No error.

EXUM, Chief Justice concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case. Given defendant's age, mental retardation, the compelling mitigating circumstances found by the jury and that juries in this state have consistently returned life sentences under similar circumstances, I believe that the death penalty here is excessive and disproportionate. I respectfully dissent from the majority opinion insofar as it sustains the imposition of the sentence of death and vote to remand the case for the imposition of a sentence of life imprisonment.

I recognize that defendant has been convicted of at least actively assisting in the commission of first-degree murder and that the crime was committed in an especially brutal manner against an especially vulnerable victim by defendant and three accomplices.[1] The crime cries out for punishment. If the defendant were a mature adult with full mental faculties rendering him capable of fully appreciating the wrongfulness of his act, and if the mitigating circumstances found were less compelling, I would conclude, as does the majority, that the death penalty is not disproportionate.

The question is not whether this mentally retarded defendant, nineteen years old at the time of the crime, will be punished; the question as always in these cases is which punishment will he receive—death or life imprisonment. Under the power given us by statute to determine whether a death sentence is excessive or disproportionate, I conclude the statute requires that this defendant be sentenced to life imprisonment.

I first note my disagreement with the majority's position that the jury might not have rejected the premeditation and deliberation theory of first-degree murder. I believe the record reflects that the jury rejected this theory and convicted defendant only on the felony murder theory.

The verdict form, which is partially reproduced in the majority opinion, appears in the record as follows:

STATE OF NORTH CAROLINA)
VS)
HENRY LEE MCCOLLUM) VERDICT
defendant)

We, the jury, return the unanimous verdict as follows:

1. GUILTY of FIRST DEGREE MURDER
Answer: yes

IF YOU ANSWER "YES," IS IT:
A. On the basis of malice, premeditation and deliberation?
ANSWER: _____
B. Under the first-degree felony murder rule?
ANSWER: yes

OR

2. GUILTY of SECOND DEGREE MURDER
Answer: _____
OR

3. NOT GUILTY
ANSWER: _____

This the 18 day of Nov, 1991.

s/Carl M. Moses
FOREPERSON OF THE JURY

The form shows that the jury rejected verdicts of second-degree murder and not guilty by leaving the answer lines to these verdicts blank and returned a verdict of guilty of first-degree murder by writing "yes" in the answer line to this verdict. Just as clearly it seems to me, the jury rejected the premeditation and deliberation

1. Only one of defendant's accomplices, Leon Brown, was tried for the offenses, the other two apparently being juveniles. Leon Brown was convicted only of rape; he was not convicted of murder. *State v. Brown*, 83 CRS 15822, 15827 (Superior Court, Bladen County).

theory by leaving the answer line to subverdict "A" blank and convicted defendant solely on the theory of felony murder by writing "yes" on the answer line to subverdict "B."

It is true, as the majority states, that juries do not convict or acquit of theories; they convict and acquit of crimes, as we said in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). Here, for example, defendant has not been acquitted of first-degree murder; he has been convicted of it. Juries, however, do frequently reject some theories of guilt and accept others; and often it is necessary for purposes of appellate review to know which theories were rejected and which were accepted. The verdict form here was designed for that purpose, and the trial court instructed the jury that it might convict defendant of first-degree murder on either or both theories submitted. While the trial court also instructed the jury to write answers, either "yes" or "no," in all the blanks, I am satisfied, after considering the jury's responses to other answer lines on the verdict form, that the jury's leaving an answer line blank on this form is the equivalent of its writing "no" on that line.

I have no disagreement, however, with the result reached by the majority on the question of whether the evidence supports the aggravating circumstance that the murder was committed to avoid arrest. That the jury rejected the theory of premeditation and deliberation does not mean it could not have legitimately found the aggravating circumstance. The findings are not, as defendant seems to argue, mutually exclusive. A defendant can commit a murder for the purpose of avoiding arrest and still not premeditate and deliberate the killing.

N.C.G.S. § 15A-2000(d)(2) mandates that we consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). This requires a comparison of "the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and *mental condition*." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985) (emphasis added). A comparison of this case to those in other capitally tried cases in our proportionality pool in which both crimes and defendants are similar to the crime and defendant in the instant case compels the conclusion that the sentence of death here is excessive and disproportionate.

Defendant was convicted of felony murder based on the underlying felony of rape. The evidence tended to show the murderous act itself was committed by someone other than defendant, although defendant actively assisted by holding the victim and was clearly guilty as an aider and abettor. At the time of the crime defendant was nineteen years old. He suffered from mental retardation and functioned at a mental age of eight to ten years. Defendant's intelligence quotient (IQ), which was tested on two different occasions, was scored at 61 and 69. Achievement test results showed defendant functioned at a third grade level with the reading comprehension level of a second grader.

At sentencing, the jury found two aggravating circumstances—that the murder was committed to avoid arrest and that it was especially heinous, atrocious or cruel. It also found seven mitigating circumstances—no significant history of prior criminal activity, commitment of the felony murder under the influence of mental or emotional disturbance, that defendant was mentally retarded, that he was easily influenced by others, that he had difficulty thinking clearly under stress, that he cooperated with police, and that he had adapted to his prison environment. Notwithstanding, the jury recommended a sentence of death.

Upon reviewing prior felony murder convictions based on acts similar in nature to the instant case and perpetrated by defendants having similar characteristics to those of defendant McCollum, I am compelled to draw the conclusion that a sentence of death under these circumstances is disproportionate.

Of all capital cases involving felony murder convictions with an underlying felony of a sex offense, only five have involved defendants who were less than or equal to twenty years of age. All five of these cases resulted in a jury recommendation of life imprisonment. *State v. Jenkins*, 311 N.C. 194, 317 S.E.2d 345 (1984) (seventeen-year-old defendant); *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983) (eighteen-year-old-defendant); *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989) (twenty-year-old defendant); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (nineteen-year-old defendant).

Defendant was also found to be mentally and emotionally disturbed at the time of the offense. In sexual offense felony murder cases where evidence of mental and emotional disturbance on the part of the defendant has been present, juries have repeatedly recommended life imprisonment even where the defendant was the actual perpetrator of an especially heinous, atrocious or cruel killing. *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992) (mentally or emotionally disturbed defendant sentenced to life imprisonment for felony murder of victim even though jury found killing to be especially heinous, atrocious or cruel); *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991) (jury recommended life sentence for emotionally and mentally disturbed defendant who raped and murdered victim under especially heinous, atrocious or cruel circumstances); *State v. Flack*, 312 N.C. 448, 322 S.E.2d 758 (1984) (emotionally, mentally disturbed defendant sentenced to life imprisonment for the especially heinous and atrocious strangulation, beating and sexual assault of eighty-eight-year-old woman); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (codefendant of *Flack* also found to be emotionally, mentally disturbed and sentenced to life imprisonment).

While here the jury did not find that defendant's capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law was impaired, it did find, along with six other mitigating circumstances, that defendant was mentally retarded. Significantly, where a jury of this state has been charged in the past with the task of capitally sentencing a defendant whom it found to be mentally retarded, it has recommended life imprisonment. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983). In *Fincher* the defendant was convicted of first-degree murder on the theory of felony murder based on the underlying felony of rape. Unlike defendant McCollum, defendant Fincher actually committed the murderous act. *Id.* at 13, 305 S.E.2d at 693. Similar to defendant McCollum, however, Fincher was a mentally retarded seventeen-year-old, suffering from a schizophreniform disorder, with an IQ measured at 50 and 65. *Id.* at 7, 305 S.E.2d at 690. As in this case, the jury found as an aggravating circumstance that the murder was heinous, atrocious or cruel and as a mitigating circumstance that the murder was committed while the defendant was mentally or emotionally disturbed. The jury returned a sentence of life imprisonment.

Of fifteen cases involving a capitally tried defendant in which there was evidence that the defendant was mentally retarded, I have found only one, *State v. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2833, 100 L.Ed.2d 934 (1988), where this Court sustained a sentence of death. Significantly, in *Spruill* the jury rejected this evidence and refused to find the mental retardation mitigating circumstance submitted to it. Indeed, the jury failed to find any mitigating circumstances at all.

In its proportionality review, the majority has relied on two cases, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 108 S.Ct. 359, 98 L.Ed.2d 384 (1987); and *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed.2d 173 (1983), both of which I find quite unlike the case at bar. In *Zuniga* the defendant was sentenced to death for the stabbing and killing of a seven-year-old girl during the commission of the felony of first-degree rape. Unlike

the present case, defendant Zuniga was convicted of first-degree murder on the theory of premeditation and deliberation. At the time of the offense, Zuniga was twenty-seven years old; and there was no evidence of, nor did the jury find the existence of, any mental or emotional disturbance or mental impairment on the part of the defendant. In *McDougall*, the defendant, who was twenty-five, was convicted of first-degree felony murder and sentenced to death even though the jury found the defendant was under the influence of a mental or emotional disturbance at the time the offense was committed. However, unlike the instant case, there were two underlying felonies—kidnapping and rape—instead of the one felony of sex offense. After voluntarily injecting cocaine, the defendant in *McDougall* tricked two women into letting him into their home before he "commenced a campaign of terror against [them], cutting, stabbing and slashing them with a butcher knife." 308 N.C. at 37, 301 S.E.2d at 319. The *McDougall* jury found the existence of three aggravating circumstances, one of which was the defendant's prior conviction for the felony of rape. The jury in the present case found as a mitigating circumstance that defendant had no prior history of criminal activity.

We said in *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), that if, after making the comparisons with similar cases, considering both the crimes committed and the defendants who committed them,

> we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

In cases like the one before us, considering both the crime and the defendant, juries have consistently been returning verdicts of life imprisonment. I conclude, therefore, that the sentence of death against this defendant is disproportionate under N.C.G.S. § 15A-2000(d)(2).

I also believe that a strong argument can be made that the imposition of the death penalty upon a defendant whom the jury finds to be mentally retarded constitutes cruel or unusual punishment violative of Article I, Section 27, of the North Carolina Constitution, which provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

"The law's humanity would seem to dictate that rarely if ever should death be the appropriate punishment for a defendant who kills under the influence of a mental or emotional disturbance and whose capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law is impaired. Punished he should be. But *execution of a defendant whose crime is the product of a mentally and* emotionally defective personality and who suffers from an incapacity to control his conduct is excessively vindictive." *State v. Rook*, 304 N.C. 201, 246–47, 283 S.E.2d 732, 759 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982) (Exum, J., now C.J., dissenting) (emphasis supplied).

Recently the United States Supreme Court visited the question whether execution of the mentally retarded violated the United States Constitution's prohibition in the Eighth Amendment of "cruel and unusual punishment;" by a five to four majority, the Court concluded that it did not. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). A great deal that can be said on this issue was said in the opinions delivered in that case. The Amicus Curiae Brief filed in *Penry* by the American Association on Mental Retardation, The American Psychological Association, the Association for Retarded Citizens of the United States, and other organizations with expertise on the subject is compelling. So is information contained in Conley, Luckasson and Bouthilet, *The Criminal Justice System and Mental Retardation* (Paul H. Brooks 1992), containing a forward by Dick Thornburgh written

when he was Attorney General of the United States, published since, and critical of, the decision in *Penry*.

The four dissenters in *Penry* make a powerful case for the proposition that execution of the mentally retarded violates the Eighth and Fourteenth Amendments. We, of course, are bound by the majority's decision in *Penry* that it does not insofar as the federal document is concerned. We are able to decide, however, that such executions violate our State's constitutional prohibition against cruel or unusual punishments.

Defendant, however, did not raise this argument at trial nor on appeal; and it has not been briefed or argued in this case. The question, therefore, is not properly before us; and until it has been briefed and argued, I am unwilling to address it definitively.

FRYE, J., joins in this concurring and dissenting opinion.

93-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

.....

HENRY LEE MCCOLLUM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

.....

CERTIFICATE OF SERVICE

.....

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 17th day of December, 1993, one copy of the Petition for Writ of Certiorari (complete with appendices), and Petitioner's Request to Proceed *In Forma Pauperis* in the above-entitled case were served on Mr. David Roy Blackwell, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 17th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
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